

**ADVANCING INTERNATIONAL CRIMINAL JUSTICE
IN SOUTHEAST ASIA THROUGH THE REGIONALISATION OF
INTERNATIONAL CRIMINAL LAW**

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ABSTRACT

Only two Association of Southeast Asian Nations (ASEAN) countries have ratified the International Criminal Court (ICC) Statute, and this number is unlikely to change dramatically in the near future. This research thus considers how international criminal justice (ICrimJ) can be advanced through the regionalisation of international criminal law (ICL), whilst also serving the interests of ASEAN Member States. The theoretical appeal, practical viability, and political acceptability of regional ICrimJ mechanisms are accordingly examined. Given that the establishment of the ICC has challenged the absolute sovereignty of States over the prosecution of international crimes, regional initiatives have added political allure as they not only better reflect local legal norms and political considerations, but also place the selection of 'regional crimes' and enforcement measures primarily in the hands of regional countries. In recognition of the 'ASEAN way' of making decisions, regional initiatives to further ICrimJ in Southeast Asia should be implemented gradually and driven internally through consultation and consensus. Moreover, to achieve the overarching ASEAN goal of maintaining regional peace and security, the modalities and practical effects of ICrimJ may require greater emphasis on deterrence and reconciliation, instead of punishment.

The prospect and efficacy of a regional ICrimJ mechanism however also depends, *inter alia*, on the availability of institutional infrastructure and resources, and will understandably differ between regions. Nevertheless, some general conclusions about the value and attractiveness of a regional approach to ICrimJ can be drawn. Despite variations on what may constitute justice in different geographic areas, these generalisations are useful because they reveal the incentives and favourable conditions for efforts at the regional level. The research therefore proffers a basic framework to assess the costs and benefits of regional solutions against domestic or international methods of enforcing ICL, and determine which may best serve ICrimJ in each unique situation and circumstance.

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INTRODUCTION
THE POSSIBILITY OF A REGIONAL APPROACH TO
INTERNATIONAL CRIMINAL JUSTICE IN SOUTHEAST ASIA

More than 15 years have passed since the Rome Statute of the International Criminal Court (ICC) was adopted in 1998, but countries in Asia still remain unenthusiastic about the ICC endeavour. Of the ten countries that constitute the Association of Southeast Asian Nations (ASEAN), only Cambodia (in 2002) and the Philippines (in 2011) have ratified the Rome Statute.¹ Currently, the prospects of the other ASEAN Member States (AMS) ratifying the Statute in the near future, either individually or collectively as a sub-regional group are remote. This is because regional considerations and attitudes towards the international system helmed by the ICC are unlikely to radically change. For example, it was announced in May 2013 that Indonesia would not accede to the Statute, despite earlier indications that it would.² Defence Minister Purnomo Yusgiantoro argued that the ratification was not imperative as Indonesia already had domestic legal instruments that were adequate foundations for human rights protection in the country. The possibility that the ICC could be misused to interfere in internal political affairs was another factor cited by Indonesian politicians.³ Such views are compounded by the general lack of interest and focus on international criminal law (ICL) within the region.

The main objective of this research is then to identify the most effective way to advance international criminal justice (ICrimJ) in Southeast Asia. Must ASEAN countries abide by the same ICrimJ standards accepted by 122 States from other regions of the world, or can those standards be made more flexible and reflective of local norms and conditions? The research thus examines whether ICrimJ can be further promoted and protected in Southeast Asia both by recognising theoretical variants in different regions, and through the regionalisation of ICL in terms of regional enforcement mechanisms or lists of crimes. It is noted that investigating, prosecuting and enforcing ICL has, broadly speaking, vacillated between national courts and international criminal courts. Prosecuting and punishing individuals who

¹ Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 3; 37 ILM 999.

² Margareth Aritonang, "Govt officially rejects Rome Statute", *The Jakarta Post*, 21 May 2013.

³ This includes the concern that the ratification of the Rome Statute could be used to affect or even block the bids of candidates in the 2014 Indonesian Presidential elections, in particular Gen (retired) Wiranto and Lt. Gen (retired) Prabowo Subianto who have been deemed by the National Commission on Human Rights to be responsible for serious human rights violations during the 1998 May riots.

have committed acts prohibited by treaty or customary law, such as war crimes, traditionally remained under the purview of their own States. Supranational courts only appeared after the Second World War (WWII), starting with the establishment of the International Military Tribunal in Nuremberg.⁴

The predilection for a universal system to deal with international crimes is understandable. It is evidenced by more than a century's worth of effort to create an international court. Yet, under the principle of complementarity advanced by the ICC, the promotion and protection of ICrimJ has returned to the national level. States have primacy in investigating and prosecuting an individual accused of core international crimes, and the ICC can only exercise its jurisdiction if domestic courts are unable or unwilling genuinely to do so. Some commentators thus contend that the future of ICL may be domestic.⁵ Nevertheless, certain scholars have noted that the euphoria surrounding the development of ICrimJ has faded, the momentum for the international system has disappeared, and disillusionment has set in.⁶ This is partly due to the fact that the reluctance of a State to prosecute or extradite a suspect, compounded by regional reticence, has called into question the enforcement of ICrimJ in either domestic or internationalised criminal courts.

In this regard, it is important to heed regional distinctions between countries that are member States of the ICC (black), those that have signed by not yet ratified the Rome Statute (light grey), and States that have not signed Rome Statute (dark grey).⁷ A possible explanation for these discernable geographical 'gaps' in terms of ratification is that while ICrimJ may be universally accepted as a concept, States prefer to enforce it according to their regional contexts and implement it differently in

⁴ This is generally regarded as the beginning of modern ICL. However, it is noted that the first reported international prosecution for war crimes occurred in 1474, when Peter von Hagenbach was tried by an *ad hoc* tribunal and found guilty of atrocities committed during the occupation of Breisach. See Edoardo Greppi, "The Evolution of Individual Criminal Responsibility under International Law", *International Review of the Red Cross* 835 (1999): 531-553.

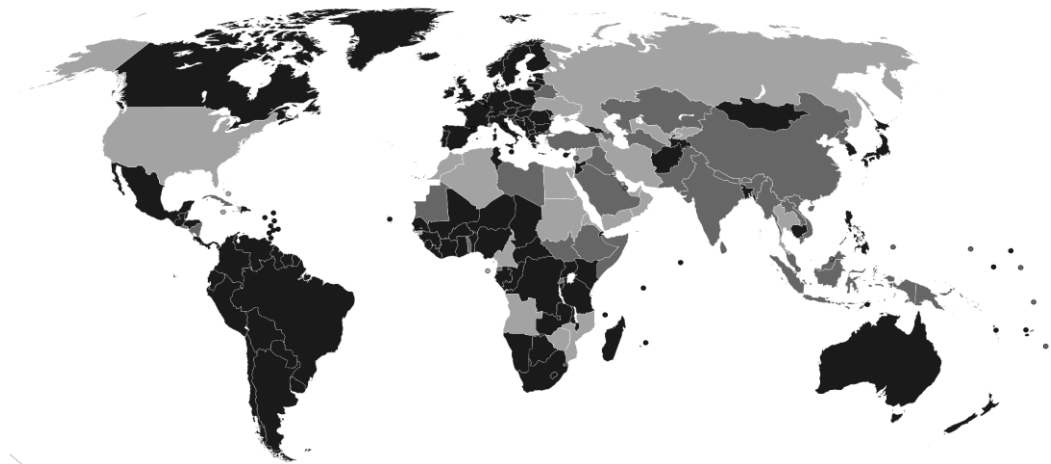
⁵ Given the limited financial and human resources of the ICC (or any other internationalised institution), State-level action under the principles of primacy and complementarity is recognised as a more effective and efficient way to further ICrimJ. Burke-White thus notes that enforcement of ICL is "effectively migrating from international tribunals to national courts". William Burke-White, "A Community of Courts: Towards a System of International Criminal Law", *Michigan Journal of International Law* 24 (2002):1-101.

⁶ Florian Jessberger and Julia Geneuss, "Down the Drain or Down to Earth? International Criminal Justice under Pressure", *Journal of International Criminal Justice* 11 (2013): 501-503, at 501.

⁷ Data as at June 2014.

practice. This may be due to different regional underpinnings and objectives of ICL,⁸ or because the ICC and its associated rules are felt to have not adequately accommodated constructs of justice that exist in different parts of the world.⁹ As such, the version of ICrimJ ensconced in the Rome Statute is unappealing, irrelevant, or worse illegitimate in these regions.

Map 1.1 – ICC Rome Statute Ratification Status



That said, it is recognised from the international human rights debate that Asia is too diverse to claim that any homogeneous culture and uniformity of norms exists.¹⁰

⁸ This may be akin to the differing regional norms and priorities that exist in human rights. In this regard, there may be a Rawlsian notion of right and justice, where although the ‘society of peoples’ should be able to agree that all the laws “are reasonable”, they may differ on the ranking of the laws. Important for the present discussion is the point that “we get different formulations of the principles of justice” as these ideas can be interpreted in different ways. John Rawls, *The Law of Peoples: with “The Idea of Public Reason Revisited”* (Cambridge: Harvard University Press, 1999), at 14.

⁹ While there are claims that the ICC merely codified existing international law, it is noted that while there are international conventions on genocide and war crimes, crimes against humanity have not been set out in a comprehensive treaty. On 30 July 2013, the UN International Law Commission voted to add the elaboration of such a treaty to its long-term agenda. For a discussion, see Leila Sadat, ed., *Forging a Convention for Crimes Against Humanity* (Cambridge: Cambridge University Press, 2011).

¹⁰ Yamane points out that besides its geographical breadth, Asia lacks any shared history (even in terms of colonial experience) and countries in the region have a host of political ideologies, cultural norms, religious practices, formal legal systems and informal conflict resolution practices, as well as varied levels of economic development. Similarly, Yasuaki notes that Asia is not a coherent unit and it is “commonplace to talk about the diversity of Asia and to divide Asia into four regions: East, Southeast, South and West”. See Hiroko Yamane, “Asia and Human Rights”, in Karel Vasek and Philip Alston, eds., *The International Dimensions of Human Rights* (Westport: Greenwood Press, 1982), at 651-670; and Onuma Yasuaki, “In Quest of Intercivilizational Human Rights: Universal vs. Relative Human Rights Viewed from an Asian Perspective”, *Center For Asian Pacific Affairs Occasional Paper 2* (March 1996), at 1-2.

For a regional approach for advancing ICrimJ and enforcing ICL to be considered, it may thus be more prudent to focus attention at the sub-regional level, rather than argue for a pan-Asian system. For the countries in Southeast Asia, it is indeed more realistic to explore the possibility of a sub-regional ICrimJ regime within the ASEAN construct.¹¹ This would not only take advantage of existing institutional infrastructure, but more importantly also tap on the experience of Southeast Asian nations working together based on their consensual ethos and shared pragmatism.

Southeast Asia is also worthy as a focused study on regionalising ICrimJ for several other reasons. Firstly, the Cambodian experience with the Khmer Rouge trials has not had a spill-over effect on the rest of Southeast Asia,¹² and little attention has been paid to the development of ICL in the region both from within and outside ASEAN.¹³ Second, the countries in Southeast Asia have a range of various legal systems.¹⁴ The region therefore provides a good test case to evaluate the various ideas and assess if there are any inherent conflicts between systems. The cultural, religious and ethnic diversities across the region comprising of both developing and developed countries also provide similar advantages in overcoming related bias.

Addressing a Gap in the Literature

An enormous amount of literature exists on the development of ICL at both the universal and national levels, but there has been little research on the role that regional options can play in the promotion of ICrimJ.¹⁵ Although Burke-White conducted a preliminary exploration of the regionalisation of international criminal law enforcement,¹⁶ he and various scholars believed that the future of ICL enforcement

¹¹ Although various other regions had synchronised positions or integrated policies on the ICC, there was no common position for Asia. Ahmed Ziauddin, “A Continent in Need of the ICC – International Criminal Court Campaigns in Asia”, *International Criminal Court Monitor* 19 (2001), at 15.

¹² For an assessment, see discussion on the Extraordinary Chambers in the Courts of Cambodia (ECCC) in Chapters 1 and 4.

¹³ See also discussion on the Special Panels for Serious Crimes (SPSC) of East Timor in Chapter 1.

¹⁴ These include civil law (Vietnam); common law (Myanmar and Singapore); a pluralistic mix of common and civil law (Philippines and Thailand); a pluralistic mix of civil and religious law (Indonesia); a pluralistic mix of common and religious law (Brunei and Malaysia), and a hybrid of civil law and customs (Cambodia and Laos).

¹⁵ A distinction is drawn between the lack of regional ICL initiatives and existing regional mechanisms that tackle transnational criminal activities, such as the ASEAN Declaration on Transnational Crime. See Chapter 5 for a discussion on this treaty and the possibility of ‘regional crimes’ within Southeast Asia.

¹⁶ William Burke-White, “Regionalisation of International Criminal Law Enforcement: A Preliminary Exploration”, *Texas International Law Journal* 38 (2003): 729-761.

was largely fixed at the domestic level.¹⁷ While there have been some promising discussions about regionalising ICL in the context of specific regions,¹⁸ none fully explores the possibility of a regional mechanism or court with jurisdiction over core international crimes.¹⁹ As such, the regionalisation of ICL has received little attention, and the notion of promoting and protecting ICrimJ at the regional level has remained largely unexplored.

It is however not as if the regional view of ICrimJ and ICL is either irrelevant or non-existent. It is worth noting that, based on a report of the Committee of Eminent African Jurists, the African Union (AU) had decided that the case against Hissène Habré fell within its competence, and called on Senegal to prosecute the former President of Chad for international crimes “on behalf of Africa”.²⁰ Moreover, the allegations by African countries that the ICC unfairly targets their region, and the AU position against the ICC indictments of sitting Sudanese President Omar al-Bashir and Kenyan President Uhuru Kenyatta, serve to highlight both regional divisions regarding ICrimJ and the difficulties in executing an arrest warrant without regional backing.²¹

The research therefore also hopes to address this existing lacuna in the literature on the possibility of regional approaches to ICrimJ and ICL, which is especially surprising since initiatives in one region can serve as a template for or spur development in other regions.²² In addition, a regional approach will also allow States to overcome the need for unanimity that haunts international treaty law.²³ Indeed, regionalisation has already emerged as the bridge in other highly divisive branches of

¹⁷ Burke-White, *supra* n.5; and Anne-Marie Slaughter and William Burke-White, “The Future of International Law is Domestic”, *Harvard International Law Journal* 47 (2006): 327-352.

¹⁸ See Neil Boister and Alberto Costi, eds., *Regionalising International Criminal Law in the Pacific* (Wellington: New Zealand Association for Comparative Law, 2006).

¹⁹ While there have been discussion on regionalising efforts against transnational crime and implementing the ICC Rome Statute at the regional level, the provision of ICrimJ is less explored. See Shennia Spillane, “Possibilities and Pitfalls: Regionalising Criminal Law in the Pacific Islands Forum” in Boister, *supra* n.18; and Olympia Bekou, “Regionalising ICC Implementing Legislation: A Workable Solution for the Asia-Pacific Region?” in Boister, *supra* n.18.

²⁰ See Decision on the Hissène Habré Case and the African Union, Doc. Assembly/AU/3(VII), Assembly of the African Union, Seventh Ordinary Session, 1-2 July 2006, Gambia.

²¹ See discussions on the AU growing resistance towards the ICC, particularly in relation to these two cases, in Chapters 1 and 2.

²² For example, by allowing States to expand the list of crimes to address specific priorities in their regions, such as drug trafficking in the Caribbean, opens up the opportunity for an expanded list of crimes to later be adopted in other regions or at the international level.

²³ This is most clearly illustrated by international trade negotiations, where States proceeded with bilateral, or regional agreements amongst willing partners to overcome international deadlock on a global trade deal.

international law like human rights, and presented effective solutions in addressing issues like peace and security.²⁴

Methodology

It is important to adopt a methodology used to suit not only the types of questions asked but also the overall purpose of the research.²⁵ With this in mind, the research employs a theoretical approach to discuss the regionalisation of international law. It will draw upon International Relations (IR) theories to provide the context in which public international law currently operates. Indeed, a State-centric perspective based on an IR analytical framework will help elucidate the development of the ICrimJ system and the current status of ICL, especially at the institutional level of the ICC. For example, it identifies important political and practical considerations, such as the political reality that sovereign States favour penalizing “a limited number of acts” and prefer to avoid the creation of a single authoritative international criminal code.²⁶ In this regard, the research examine whether furthering ICrimJ through regional initiatives will help in the effective enforcement of ICL, whilst also serving the interests of sovereign States. Validating the theoretical appeal and utility of regionalism to self-interested States will be a crucial step to cross in the development of any regional ICrimJ initiative or mechanism.

The research will also employ a doctrinal method to examine issues of law and practice, to ascertain the limits of the notion of regionalising international law in general, and the range of options available to ICrimJ in particular. The doctrinal research will involve unpacking and analysing the legal issues surrounding criminal justice and ICL gathered from both relevant primary material like case law,

²⁴ See discussion in Chapter 3.

²⁵ Kissam identifies six overlapping purposes of legal scholarship: (1) to provide legal analysis of cases and statutory provisions, or to explain, interpret and criticise these cases or laws; (2) to provide legal synthesis of disparate elements of laws into a coherent or useful legal standards or general rules; (3) to resolve doctrinal issues; (4) to produce teaching materials for students; (5) to understand the legal doctrine, including the explanation of causes, the analysis of consequences, and the interpretation of meaning; and (6) to critique legal doctrine and practice and argue for a better way of doing things. Philip Kissam, “The Evaluation of Legal Scholarship”, *Washington Law Review*, 63 (1988): 221-256, at 230-239.

²⁶ Steven Ratner, Jason Abrams and James Bischoff, *Accountability for Human rights Atrocities in International Law – Beyond the Nuremberg Legacy*, 3rd ed. (Oxford: Oxford University Press, 2009), at 365.

international treaties and conventions,²⁷ as well as secondary sources that serve to elaborate and clarify the intentions and principles of the primary material.²⁸

The research is however cognisant of the inherent drawbacks of exclusively doctrinal and library-based research, in particular of the criticism that it fails to consider the political, economic and social impact and influence on the legal process.²⁹ A strict legal doctrinal methodology alone is unable to provide a sufficient framework to fully understand and address the complexity of practical issues that arise in the context of international law. Indeed, by only focusing on treaty instruments or strictly examining State practice and custom in a formalistic way, one risks missing the real and practical problems of securing State acceptance, thereby reducing the validity of the research.

Although the development of ICrimJ and ICL cannot be explained within a vacuum and must be understood with a theoretical lens, the research also does not employ a socio-legal research method *per se*.³⁰ Rather, it favours a distinct method that caters to the special nature of international law – focusing on the observation of State practice and *opinio juris*. To develop and ground the concept of a regional system of criminal justice, the research also adopts an international law methodology by examining examples of the role of regionalisation in other branches of public international law.

A focused case study will then be employed to address the limited practical applications and conclusions that can be derived from a strictly doctrinal research.³¹ By adopting such a tool, the research is consciously trying to avoid overstating the viability of its options and stretching its conclusions, as well as to determine the mechanisms through which ICL can be realistically and best enforced amongst the AMS. As such, the research will also involve some interdisciplinary elements in terms

²⁷ The principal or even sole aim of doctrinal research is to “describe a body of law and how it applies”. Ian Dobinson and Francis John, “Qualitative Legal Research”, in Mike McConville and Wing Hong Chui, eds., *Research Methods for Law* (Edinburgh: Edinburgh University Press, 2007), at 19.

²⁸ Doctrinal research is thus not research *about* the law, but research *in* law. Paul Chynoweth, “Legal Research”, in Andrew Knight and Les Ruddock, eds., *Advanced Research Methods in the Built Environment*, (Oxford: Blackwell, 2008), at 30.

²⁹ Pure doctrinal analysis has been criticised as an “intellectually rigid, inflexible and inward-looking” way to understand law and how the legal system operates. Douglas Wick, “Interdisciplinarity and the Discipline of Law”, *Journal of Law and Society* 31 (2004):163-193, at 164.

³⁰ For more on socio-legal research, see Reza Banakar and Max Travers, “Law, Sociology and Method”, in Reza Banakar and Max Travers, eds., *Theory and Method in Socio-legal Research* (Oxford: Hart Publishing, 2005).

³¹ For details on case study research methodology, see Robert Yin, *Case Study Research: Design and Methods*, 4th ed. (London: Sage Publication, 2009).

of using IR theories to contextualize ICL. This will further allow the research to tease out how law and justice interact and work in ‘the real world’, as well as to better appreciate the opportunities that regional approaches may offer in different parts of the world. A major component of the research will therefore involve analysis of collective regional norms from Southeast Asia. As such, the research does not intend to employ quantitative empirical methods to superficially argue the formation of any regional customs.³² An inductive approach is instead favoured, where the theory and research questions will be examined and linked through a qualitative study.

In sum, the research will be largely doctrinal in terms of the theoretical examination of ICrimJ. However, it will also involve an interdisciplinary element to firstly better understand the theoretical acceptability of regionalisation of ICrimJ amongst State actors, and then secondly identify opportunities that regional approaches may realistically offer within the international political context that ICL operates.

Defining Regionalism and Regionalisation

At this juncture, it may be prudent to first define regionalism and regionalisation, as well as understand how a region is identified. This not only provides some clarity on what the regionalisation of ICrimJ actually entails, but also the actors for such an endeavour. A ‘regionalised’ world has always featured in human history.³³ Ravenhill highlights that the notion of regionalism dates back several centuries,³⁴ while Fawcett notes that regions have dominated the international system as “empires, spheres of influence, or just powerful states and their allies”.³⁵ As the frequency of regional cooperation increases, the notion of regionalism has become an ingrained feature of international relations and politics.³⁶ For example, the independent countries of the

³² Quantitative empirical methodology incorporates the research practices in natural science, and is based on quantifying the collected and analysed data. For more on empirical legal scholarship, see Tracey George, “An Empirical Study of Empirical Legal Scholarship: The Top Law Schools”, *Indiana Law Journal* 81 (2006):141-161.

³³ See Morten Bøås, Marianne Marchand and Timothy Shaw, “The Weave-world: The Regional Intervening of Economies, Ideas and Identities”, in Timothy Shaw and Fredrik Söderbaum, eds., *Theories of New Regionalism* (Basingstoke: Palgrave Macmillan, 2003).

³⁴ John Ravenhill, “Regionalism”, in John Ravenhill, ed., *Global Political Economy*, 2nd ed. (Oxford: Oxford University Press, 2007), at 183.

³⁵ Louise Fawcett, “Exploring Regional Domains: A Comparative History of Regionalism”, *International Affairs* 80 (2004): 429-446, at 436.

³⁶ Fawcett asserts that regionalism is now worldwide and cannot be dismissed as ‘a mere fad’. Others like Acharya, however, reject or downplay the importance of regions in world order. See *ibid*, at 438;

Americas began developing both regional identities and inter-state structures in the late nineteenth-century.³⁷ After WWII, the principle of regional action and cooperation was then firmly established under the UN Charter, which allocated a role to regional organisations in the international legal order.³⁸ The UN thus supplied regional bodies with endorsement and legitimacy, and accordingly demanded accountability under Chapter VIII.³⁹ A counter-intuitive feature of globalisation has then been its “distinctly regional flavour”,⁴⁰ and the growing importance of regions has been reflected in both academic and policy debates.⁴¹

In this regard, regions and regionalism do not exist in a vacuum,⁴² and a strong case exists for the region to be distinguished as a level of analysis from the international.⁴³ Regionalism is therefore differentiated from universalist and unilateralist approaches, as well as the IR theories like neo-realism and neo-liberalism that serve to explain its occurrence. Rather, it represents activity by States that is less than global but more than that of any individual State,⁴⁴ and may be permanent or temporary, institutionalised or not.⁴⁵ A crucial point however is that there is a

Amitav Acharya, “The Emerging Regional Architecture of World Politics”, *World Politics* 59 (2007): 629-652, at 630; and Björn Hettne, András Inotai and Osvaldo Sunkel, eds., *Globalism and the New Regionalism* (Basingstoke: Macmillan Press, 1999).

³⁷ Diana Tussie, “Latin America: Contrasting Motivations for Regional Projects”, *Review of International Studies* 35 (2009): 169–188.

³⁸ In Article 52 of the UN Charter, regional agencies were legitimised and offered a formal if somewhat undefined role in conflict resolution.

³⁹ See Articles 52 and 53 of the UN Charter.

⁴⁰ Mark Beeson, “Rethinking Regionalism: Europe and the East Asia in Comparative Historical Perspective”, *Journal of European Public Policy*, 12 (2005): 969-985, at 969.

⁴¹ Shaw and Soderbaum argue that regionalism is one of the dominating trends in current international studies, while others have described the need to contemplate regionalism as “so conspicuous”. See Timothy Shaw and Fredrik Soderbaum, eds., *Theories of New Regionalism* (Basingstoke: Palgrave Macmillan, 2003), at 1; and Shaun Breslin, Richard Higgott and Ben Rosamond, “Regions in comparative perspective”, in Shaun Breslin et al., eds., *New Regionalism in the Global Political Economy* (London: Routledge, 2002), at 1.

⁴² While they are necessarily informed by geographical, political, economic, strategic and cultural concerns, these concepts also take place in an environment that is in turn informed by norms, trends, values and practices that relate to different regional and global settings. Fawcett, *supra* n.35, at 429.

⁴³ See Peter Katzenstein, *A World of Regions: Asia and Europe in the American Imperium* (Ithaca, NY: Cornell University Press, 2005); and Barry Buzan and Ole Wæver, *Regions and Powers*, (Cambridge: Cambridge University Press, 2003).

⁴⁴ Nye opines that regional organisations are arrangements not “globally inclusive in their membership”, while Downs argues that regionalism occurs where the number of States falls short of universalism. See Joseph Nye, “Regional Institutions”, in Cyril Black and Richard Falk, eds., *The Future of the International Legal Order: The Structure of the International Environment*, (Princeton: Princeton University Press, 1972), at 430; and George Downs, ed., *Collective Security Beyond the Cold War* (Ann Arbor: University of Michigan Press, 1994).

⁴⁵ Regionalism currently refers to a variety of things across a full spectrum of activities, and extensive scholarly research on regionalism has “yet to generate a widely accepted definition of it”. Edward Mansfield and Helen Milner, “The New Wave of Regionalism”, *International Organization* 53 (1999): 589–627, at 590.

“politically defined limit” to regionalism.⁴⁶ This is clearly the case with ASEAN, which has thus far excluded East Timor from becoming a member despite the country’s geographical location.

For the purpose of this research, ‘regionalism’ is therefore accepted as the phenomenon of cooperation and coordination among States “within a given region”, so as to “pursue and promote common goals in one or more issue areas”.⁴⁷ Fawcett notes that such interactions can range from advancing regional identity or awareness by consolidating regional groups and networks (soft regionalism), to formalising regional or sub-regional groupings through treaties and institutions (hard regionalism).⁴⁸ This definition, coupled with Fawcett’s clarification, aptly describes the situation in Southeast Asia and the relationship between AMS, where the maintenance of regional peace and security has been the common aim. Although it may be a subtle distinction, the research focuses on voluntary regionalism (as opposed to coercive regionalism⁴⁹) by States because no country is obligated to be part of ASEAN.⁵⁰ Regionalism thus includes a broad range of policies or projects initiated at various levels and at different times by diverse regional actors, whereby the coordination itself further defines the region.⁵¹ Such policies may be any intentional cross-border activity, and may extend even as far as integration and ceding significant amounts of national decision-making to a supranational authority like the European Union (EU).⁵²

While some scholars have then sought to distinguish ‘regionalism’ and ‘regionalisation’ based on whether the regional programme is a State-led or a driven

⁴⁶ Björn Hettne, “Globalization and the New Regionalism: The Second Great Transformation”, in Hettne, *supra* n.36, at 9.

⁴⁷ Richard Falk, “The Post-Westphalia Enigma”, in Björn Hettne and Bertil Odöen, eds., *Global Governance in the 21st Century: Alternative Perspectives on World Order*, (Stockholm: Almqvist & Wiksell, 2002), at 177.

⁴⁸ Fawcett, *supra* n.35, at 433.

⁴⁹ The Co-Prosperity or Warsaw Pact type of regional arrangement are then seen as coercive regionalism. *Ibid*, at 429.

⁵⁰ However, it is recognised that not everyone agrees with a narrow State-led definition of regionalism. See Fredrik Söderbaum, “Introduction: Theories of New Regionalism”, in Fredrik Söderbaum and Timothy Shaw, eds., *Theories of New Regionalism: a Palgrave Reader* (New York, Palgrave Macmillan, 2003).

⁵¹ Despite arguments that a successful regionalist project presupposes interactions with non-state actors, States remain the predominant actor in most regional arrangements, with most literature on regionalism still focusing on the more measurable institutional forms of interstate cooperation. See Fawcett, *supra* n.35, at 433.

⁵² Rick Fawn, “‘Regions’ and their study: wherefrom, what for and whereto?”, *Review of International Studies* 35 (2009): 5–34, at 13.

below the level of the State,⁵³ Higgott warns of the problems of such a distinction, especially in East Asia where “the interpenetration and blurring of public and private power is a given of the political economies of the region”.⁵⁴ It is therefore more practical and useful to understand regionalisation as a process like globalisation, but manifesting discernible differences in terms of its impact.⁵⁵ The significance of regionalisation as a route to global order has been acknowledged at the international level, particularly in the regional promotion of peace and security, or in relation to trade, aid and development policy.⁵⁶ Moreover, if regionalism is understood as an ideology of cooperation or a policy of coordination, regionalisation is then broadly the process or strategy of “developing power and responsibility and devolving them to the appropriate regional level”.⁵⁷ Regionalisation is thus a process that may “both precede and flow from regionalism”, and occur even without regionalism.⁵⁸ It may simply be a concentration of formal or informal State activity at a regional level, but could also serve as the basis of and lead to institutionalisation.⁵⁹ In this regard, informal mechanisms would then be as valid an example of regionalisation as formal and institutionalised mechanisms like a permanent regional criminal court.⁶⁰

On that note, it is crucial to reiterate that no argument is being made to replace international or national processes with regional ICrimJ initiatives. It is recognised that regionalism is but one approach to deal with various global problems.⁶¹ A regional solution is thus envisioned as another option that should be considered, and its content will differ according to unique regional considerations and the nature of

⁵³ See Ravenhill, *supra* n.34, at 174; and Andrew Hurrell, “Explaining the Resurgence of Regionalism in World Politics”, *Review of International Studies* 21 (1995): 331–58.

⁵⁴ Richard Higgott, “*De facto* and *de jure* Regionalism: The Double Discourse of Regionalism in the Asia Pacific”, *Global Society* 11 (1997), at 166.

⁵⁵ Some scholars view regionalism as an integral part of globalisation, while others see them as concepts reacting against each other. See Jefferey Sellers, *Governing from Below: Urban Regions and the Global Economy* (Cambridge: Cambridge University Press, 2002); Frank Moulaert, *Globalization and Integrated Area Development in European Cities* (Oxford: Oxford University Press, 2000); and James Mittelman, “Rethinking the ‘New Regionalism’ in the Context of Globalisation”, in Hettne, *supra* n.36.

⁵⁶ Hettne thus contends that regionalisation is about the “political ambition of establishing territorial control and regional coherence cum identity”. Hettne, *supra* n.46, at 17.

⁵⁷ Fawcett, *supra* n.35, at 434; and Björn Hettne, “Prologue to the Five Volumes”, in Hettne, *supra* n.36, at xix.

⁵⁸ Fawcett, *supra* n.35, at 433.

⁵⁹ For example, regionalisation may refer to regional responses to conflicts that spill over borders and draw in neighbouring countries, but has also been recognised to yield trading blocs and even formal institutions.

⁶⁰ See Chapter 4 for a further discussion on the appropriate form(s) for a regional approach to ICrimJ.

⁶¹ See Hettne, *supra* n.57, at xvii.

each specific situation. The underlying fundamental questions however remain how a 'region' is defined, why they exist, and the manner in which they should operate.

Identifying Regions

A region is a complex classification that “brings together both material and ‘virtual’ elements, as well as very diverging social practices and discourses”.⁶² As such, there are also various conceptual definitions for, and divergent understandings of, ‘regions’ even amongst associated disciplines.⁶³ For example, economists identify ‘regions’ through the existence of formal trading structures,⁶⁴ while geographers generally question the idea of a borderless world and refer to it as a sub-state entity.⁶⁵ For a political scientist, such sub-national groupings may be considered ‘sub-regions’, a term which can alternatively refer to linkages across the national boundaries of two or more States.⁶⁶ Additional confusion over definition then arises from policy usage. This is clearly illustrated by the fact that not only does the EU have a supranational identity as a ‘region’, but its initiatives also create cross-border ‘regional’ cooperation,⁶⁷ as well as subnational ‘regional’ entities within existing States.⁶⁸ Besides having different characteristics, the concept of a ‘region’ remains unclear because States can concurrently be members of various regional groupings, which may overlap but not coincide.⁶⁹

⁶² Anssi Paasi, “The Resurgence of the ‘Region’ and ‘Regional Identity’: Theoretical Perspectives and Empirical Observations on Regional Dynamics in Europe”, *Review of International Studies* 35 (2009): 121–146, at 131.

⁶³ Agnew notes that “philosophical confusion reigns supreme” in debates about regions. John Agnew, “Regions on the Mind Does Not Equal Regions of the Mind”, *Progress in Human Geography* 23 (1999): 91–96, at 93.

⁶⁴ Raimo Väyrynen, “Regionalism: Old and New”, *International Studies Review* 5 (2003): 25–51, at 26.

⁶⁵ For example, see David Newman, “Borders and Bordering: Towards an Interdisciplinary Dialogue”, *European Journal of Social Theory* 9 (2006): 171–86.

⁶⁶ In Europe, ‘sub-region’ has been used to describe regional initiatives among States. See Martin Dangerfield, *Subregional Economic Cooperation in Central and Eastern Europe: The Political Economy of CEFTA* (Cheltenham: Edward Elgar, 2000); and Andrew Cottey, ed., *Subregional Cooperation in the New Europe: Building Security, Prosperity and Solidarity from the Barents to the Black Sea* (Houndsmills: Palgrave Macmillan, 1999).

⁶⁷ See Jennifer Yoder, “Bridging the European Union and Eastern Europe: Cross-border Cooperation and the Euroregions”, *Regional & Federal Studies* 13 (2003): 90–106.

⁶⁸ See Anssi Paasi, “The Resurgence of the ‘Region’ and ‘Regional Identity’: Theoretical Perspectives and Empirical Observations on Regional Dynamics in Europe”, *Review of International Studies* 35 (2009): 121–146.

⁶⁹ For example, not all AMS are part of the Asia-Pacific Economic Cooperation (APEC).

With the end of the Cold War, more attention was given to understand how regions fit into and affect international order.⁷⁰ The growing impact and importance of regionalism is also linked to economics and trade. However, its significance has climbed further because regions provide a “significant complementary layer of governance”.⁷¹ Given that it can “shape world order”⁷² and has a strong connection to peace and security,⁷³ regionalisation efforts may have a prominent part to play in the advancement of ICrimJ. Yet, there are also no definitive answers to what constitutes regions and how they affect and interact with the larger global system. Indeed, not only does an ‘ideal region’ not exist, but regions are also “not given once and for all: it is built up and changes”.⁷⁴ It is thus important to adopt a degree of definitional and theoretical flexibility as regions may vary over time in terms of their composition and size, power and capabilities, as well as aspirations.⁷⁵ Two basic questions arise from these points. Firstly, how much does geography matter in the making and functioning of regions? Secondly, does identity projection help clarify the study regions?

Geography certainly helps differentiate regions from other multilateral groupings, and debates about its significance over social processes still point to the importance of geographic proximity.⁷⁶ Geography must therefore not be dismissed as a starting point for identification of a ‘region’, which may denote no more than the geographical reality of a cluster of countries, ranging from a few contiguous States to an entire continent. In fact, geographical markers are employed by many States and regional organisations.⁷⁷ For example, the African Union (AU) has accused the ICC of

⁷⁰ For a discussion on the rise of regionalism after the Cold War, see David Lake and Patrick Morgan, eds., *Regional Orders: Building Security in a New World* (University Park: Pennsylvania State University Press, 1997).

⁷¹ Fawcett, *supra* n.35, at 431.

⁷² Björn Hettne, “Beyond the ‘New’ Regionalism”, *New Political Economy* 10 (2005): 543–71, at 543.

⁷³ Without an “overarching and overriding global-level security dynamic”, a regional focus has become more salient. Muthiah Alagappa, “Regionalism and Conflict Management: A Framework for Analysis”, *Review of International Studies* 21 (1995): 359–87, at 359. Also See James Hentz, “Introduction: New Regionalism and the ‘Theory of Security Studies’”, in James Hentz and Martin Bøås, eds., *New and Critical Security and Regionalism: Beyond the Nation State*, (Aldershot: Ashgate, 2003).

⁷⁴ Amin Maalouf, *In the Name of Identity* (London: Penguin, 2003), at 23.

⁷⁵ Precision in defining the size and membership of a region can be very important. This may be due to demands for greater cohesion, commonality and cooperation that are found in smaller and tightly defined geographical areas. Alternatively, political considerations and selectivity could be the factor determining the inclusion or exclusion of certain States. Indeed, the history of regionalism reveals how regions have been “defined and redefined in such selective terms”. Fawcett, *supra* n.35, at 432.

⁷⁶ See Zoleka Ndayi, “‘Theorising the rise of regionness’ by Bjorn Hettne and Fredrik Soderbaum”, *Politikon: South African Journal of Political Studies* 33 (2006): 113–24.

⁷⁷ Candidate States for regional organisations are typically required to be from a certain geographic area. Anna van der Vleuten and Andrea Hoffman, “Legitimacy, Democracy and RIOs: Where is the Gap?”, in Andrea Hoffman and Anna van der Vleuten, eds., *Closing or Widening the Gap? Legitimacy and Democracy in Regional Integration Organizations*, (Hampshire: Ashgate Publishing, 2007), at 6.

unfairly targeting the region and ‘hunting’ Africans. Hence, geographical proximity should be an essential, though not necessarily the only, factor of a region.⁷⁸

That said, geographical proximity and contiguity reveal little about the definition of a region or the dynamics of regionalism.⁷⁹ Fawn even contends that “[d]epending on the characteristic emphasised, geography can become antithetical to region”, and highlights the existence of regions based on historical, cultural, linguistic, economic or religious affiliations that are not geographically contiguous.⁸⁰ Indeed, if geography and regional affiliation were hard-linked, East Timor should immediately be part of ASEAN because it shares a border with Indonesia and is well within the Indonesia archipelago. But is it not due to political reasons. Hence, a simple definition based on geography alone cannot lead very far, and a ‘region’ must incorporate an element of commonality and interaction.

Identity has then provided far stronger bonds than geography,⁸¹ and it may be prudent to consider regions as entities also held together by common experience, custom and practice,⁸² whose members display some identifiable patterns of behaviour.⁸³ Even the field of economic regionalism acknowledges that “questions of identity – are now deemed to be salient”.⁸⁴ All regions are therefore to some extent subjectively defined and understood in terms of what Adler termed “cognitive regions”.⁸⁵ The making and functioning of a region is thus closely linked with its identity projection.⁸⁶ In other words, a region may then exist only if its members define and promulgate to others a specific identity, perhaps through a shared history,

⁷⁸ For example, Nye defines a region as a group of states linked by both geographical relationship and mutual interdependence, while Agnew claims that regions are typically based on “the idea of an homogenous block of space that has a persisting distinctiveness due to its physical and cultural characteristics”. See Joseph Nye, *International Regionalism* (Boston: Little, Brown, 1968), at vii; Joseph Nye, *Peace in Parts: Integration and Conflict in Regional Organization* (New York: Little, Brown, 1971); and Agnew, *supra* n.63, at 92.

⁷⁹ Andrew Hurrell, “Regionalism in Theoretical Perspective”, in Louise Fawcett and Andrew Hurrell, eds., *Regionalism in World Politics: Regional Organization and International Order* (Oxford: Oxford University Press, 1995), at 38.

⁸⁰ Fawn, *supra* n.52, at 17.

⁸¹ Hurrell, *supra* n.79, at 38.

⁸² Emanuel Adler, “Imagined (Security) Communities: Cognitive Regions in International Relations”, *Millennium* 26 (1997): 1-27.

⁸³ See Kalevi Holsti, *The State, War, and the State of War* (Cambridge: Cambridge University Press, 1996), at 142–3.

⁸⁴ Richard Higgott, “The International Political Economy of Regionalism: Asia-Pacific and Europe Compared”, in William Coleman and Geoffrey Underhill, eds., *Regionalism and Global Economic Integration: Europe, Asia and the Americas* (London: Routledge, 1998), at 42.

⁸⁵ See Adler, *supra* n.82.

⁸⁶ States advocating regional initiatives typically “imagine a certain spatial and chronological identity for a region, and disseminated their imagined identity to others”. Iver Neumann, “A Region-Building Approach to Northern Europe”, *Review of International Studies* 20 (1994): 53-74, at 58.

language, culture or religion. Identity also has an undeniable role in regional processes,⁸⁷ and the ‘ASEAN way’ is widely seen to frame regional behaviour and options in Southeast Asia.⁸⁸ Although identities are malleable and varying a society’s conception of itself may be a source of systemic change, altering the shared identity of a group of nations is difficult. This is a crucial point that will be revisited in assessing the regionalisation of ICrimJ in Southeast Asia, particularly the discussion in Chapter 4 on acceptable modalities and the pace for which change can realistically occur.

In sum, regions and regionalism are ultimately still what States make of them.⁸⁹ The capacity of a self-defined region to articulate its identity and interests to other actors not only highlights the positivist lens required to approach regionalism, but also becomes fundamental in identifying a region. Generally, the term ‘region’ may be loosely based on either an objective sense of region created by geographic features or explicit shared identifiers that various States may select besides geographic proximity. These include cultural, economic, linguistic, or political ties.⁹⁰ In this regard, a region may but need not have an institutional form to be one. How well a group of States express their ‘regionness’,⁹¹ or “regional coherence within a particular geographic area”,⁹² also serves as an indication of how ‘real’ and successful a region has become.⁹³ For all intents and purposes, the countries of Southeast Asia have then drawn their regional boundary around the membership of ASEAN.

⁸⁷ Some argue that the region may provide more identity than a state. For example, see Iwona Sagan, “Looking for the Nature of the Contemporary Region”, *Progress in Human Geography* 28 (2004): 141-144, at 142.

⁸⁸ See Chapter 4 for a further discussion on the ‘ASEAN way’.

⁸⁹ This is because regions are essentially supra-units composed of sovereign national States. Andrea Hoffman and Anna Van der Vleuten, *Closing or Widening the Gap? Legitimacy and Democracy in Regional Integration Organizations* (Hampshire: Ashgate Publishing, 2007), at xiv.

⁹⁰ Mansfield, *supra* n.45, at 591.

⁹¹ Hettne lists five degrees of ‘regionness’, where regions are: (1) Geographical units; (2) Social systems; (3) Organized cooperation in any of the cultural, economic, political or military fields; (4) Civil societies that promote convergence of values; and (5) Subjects with distinct identities, actor capabilities, legitimacies, and structures of decision-making. Hettne, *supra* n.46, at 10-11.

⁹² Björn Hettne, András Inotai and Osvaldo Sunkel, ‘Editors’ Introduction’, in Björn Hettne, András Inotai and Osvaldo Sunkel, eds., *Comparing Regionalisms: Implications for Global Development*, (London: Palgrave, 2001), at xxviii.

⁹³ Hettne suggests that ‘regionness’ is therefore similar to ‘actorness’. Hettne, *supra* n.72, at 556.

Research Structure of the Thesis

The research notes that while talk of morality and the ‘conscience of humanity’ exists and partly underpins support for ICL,⁹⁴ the fact is that States are value-neutral entities that do not manifest or possess any teleological or ethical purpose.⁹⁵ Instead, they are driven by self-preservation – either as a zero-sum calculation in Realist political theory,⁹⁶ or through cooperation in Liberal political theory.⁹⁷ This would be true even in the English school of IR theory, where a certain set of rules/norms exist, based on shared interests,⁹⁸ within the society of States.⁹⁹ Hence, while some may argue that the development of ICL reflects an international community that resembles the neo-Grotian notion of a society of States with common fundamental interests and values, the pluralist and statist hallmarks of the Vattellian archetype cannot be ignored. As Robertson points out, “international law ‘reflects first and foremost the basic state-oriented character of world politics’ because it is a system created and controlled by sovereign states, for their convenience”.¹⁰⁰ In this regard, two fundamental aspects of international law are worth noting. First, it is very much part of and a product of IR and politics. Indeed, Luban points out that “ICJ cannot bypass politics and become an

⁹⁴ For example, Goldstone argues that Asian nations should advance the cause of ICL and support the ICC “simply because it is the right and moral thing to do”. Richard Goldstone, *South-East Asia and International Criminal Law* (Oslo: Torkel Opsahl Academic EPublisher, 2011), at 20.

⁹⁵ ICL is thus not the product of a community of humanity, but “an international society of states” acting in a combined way to create more than just an indirect system of law through suppression conventions. Neil Boister, “‘Transnational Criminal Law’?”, *European Journal of International Law* 14 (2003):953-976, at 970.

⁹⁶ The critical question in realism is not whether the State follows any ethical standard, but rather whether it has secured its survival, preserved (or enhanced) its power, and promoted its self-interest. Howard Hensel, “Anthropocentric Natural Law and its Implications for International Relations and Armed Conflict”, in Howard Hensel, ed., *The Legitimate Use of Military Force – The Just war Tradition and the Customary Law of Armed Conflict* (Surrey: Ashgate Publishing, 2008), at 38.

⁹⁷ For liberalism, States seek to protect their independence and security, while promoting their national interests, through mutual toleration and cooperation on issues of common interests. Ultimately, “they must have the will to enter into a limited contract with each other” to create a body of customary and conventional international law that would govern their relations. *Ibid*, at 49-50.

⁹⁸ According to Hedley Bull, these norms are to safeguard and promote certain basic goals, including: (1) preservation of the system and society of sovereign States; (2) preservation of the sovereignty of individual States; (3) maintenance of peace as the normal condition; and (4) other “common goals of all social life”, like limiting violence and stabilisation of possession. See Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*. (New York: Columbia University Press, 1977), at 16-19.

⁹⁹ This is akin to the neo-Grotian notion of international law, based on the shared interests and values of a society of States. Alternatively, Orakhelashvili argues that a set of fundamental norms and laws needs to exist in the international community of States based on natural law, rather than State self-preservation. See Hersch Lauterpacht, ‘The Grotian Tradition in International Law’, *British Yearbook of International Law* 23 (1946):1-56; and Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2006).

¹⁰⁰ Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (London: Penguin Press, 1999), at 83.

ordinary part of the rule of law”.¹⁰¹ Second, self-interested sovereign States undeniably remain at the centre of its development. It is true that various international organisations and many non-State actors have not only emerged on the international plane, but also increased their influence over the last half-century.¹⁰² However, while they will undoubtedly also attempt to justify their breaches or create exceptions to their legal obligations, history has shown that States are not averse to violating international rules and conventions to advance their own interests.

The attention of this research is therefore unsurprisingly firmly focused on States as the main actors in the development of international law generally and ICL in particular. Accordingly, the analytical framework of the research draws heavily from state-centric IR theories like neo-realism and neo-liberal interdependence theories. These two theoretical lenses are particularly pertinent in the context of Southeast Asia, where AMS unequivocally remain the predominant political force in the region, with self-interest as the key policy determinant. They are also consistently employed throughout the research to explain the past development of and future opportunities for ICrimJ, and will be examined further in Chapter 2.

However, as an introduction, neo-realism views States as unitary actors co-existing in an anarchic international system, which pursue their national interests generally defined in terms of maximising power and security. Totally mitigating anarchy through cooperation is deemed utopian because differing State interests will act as a brake on such initiatives, which can at most render only “modest services”.¹⁰³ Regionalism of ICrimJ can nevertheless be viewed through a neo-realist lens, where regions are essentially understood as products of State activity that operate only and to the limits of what are determined by State interests.¹⁰⁴ For example, Southeast Asian countries both created regional and joined international organisations as a natural response of weaker States trapped in a world dictated by the powerful. By extension, ASEAN was also an attempt to restrict the exercise of external hegemonic power, as well as to block the spread of communism within the founding member States. In this

¹⁰¹ David Luban, “After the Honeymoon: Reflections on the Current State of International Criminal Justice”, *Journal of International Criminal Justice* 11 (2013): 505-515, at 505.

¹⁰² International organisations with legal personalities are often said to take on a life of their own after creation, sometimes even binding and circumscribing the actions of their creator States either through hard or soft law.

¹⁰³ Stanley Hoffman, *Janus and Minerva: Essays in the Theory and Practice of International Politics* (Boulder: Westview Press, 1987), at 75.

¹⁰⁴ Incentives thus exist for States to enter into such limited self-serving arrangements, which they can also exit without difficulty. Margaret Karns and Karen Mingst, *International Organizations: The Politics and Processes of Global Governance* (Boulder: Lynne Rienner, 2004), at p. 46.

regard, neo-realism explains that as as ‘positional’ actors, States are motivated by the maintenance or enhancement of their position *vis-a-vis* other States, and will not sacrifice State sovereignty to enforce ICL unless doing so confers some relative advantage or to opposing it entails some relative costs. The question is how ASEAN countries can be best convinced to advance ICrimJ when institutions like the ICC are deemed to be incapable of addressing the anarchy in the international system.

On the other hand, neo-liberalism believes that States are the most important collective (but not unitary) actors in international relations. Cooperation amongst States is possible and will increase because: (1) multiple interactions occur in the international system between the various actors, who draw lessons from their experiences; and (2) mutual interests grow with greater interaction, communication and interdependence.¹⁰⁵ This matches the situation in Southeast Asia, where ASEAN States have not only negotiated FTAs as a regional bloc and jointly worked to address transnational issues and crimes, but also imbued ASEAN with a legal personality through the ratification of its Charter and undertaken to create an ASEAN Economic Community (AEC) by 2015. From a neoliberal perspective, the consideration is then not whether ASEAN States should move closer together on ICrimJ issues, but whether it should be formalised or institutionalised within the regional framework that currently manages the complicated interactions and interdependencies between Southeast Asian countries.

The research recognises that these two IR theories cannot be used concurrently to explain State behaviour and choices, and does not seek to determine which IR theory best explains international politics or to formulate a synthesis of these two opposing theories. Rather, the research shows that regardless of which of these two main IR theories are selected to understand international relations, the concept of regionalisation can be coherently explained and understood. This theoretical framework will importantly also be relevant and apply to the model of regional ICrimJ developed in this thesis for Southeast Asia.

The research ultimately presents the case that furthering ICrimJ and enforcing ICL through regional initiatives can serve the interest of sovereign and equal States, especially given the strong positivist reality within Southeast Asia. It discusses the value propositions for these States, especially those deaf to the call of the ICC, to

¹⁰⁵ In this regard, neo-liberalism views international law as one of the major instruments for framing and maintaining order in the international system. *Ibid.*, at 37.

advance ICrimJ and enforce ICL through regional initiatives. The research does not intend to ‘preach to the converted’. Rather, it seeks to speak to States, that are not convinced by arguments of morality and preventing impunity, in a language that they understand – structured on international *realpolitik* and political calculations. In this vein, Chapter 1 recognises that ICL is culturally specific, not collectively arrived at, and not inherently universal or value-neutral. Given that regional actors have taken on increasingly important roles and contributed to “the contemporary turn towards multilayered governance”,¹⁰⁶ Chapter 1 contends that regional initiatives can also exist for ICrimJ. A regional mechanism is then envisaged as an additional alternative that may be more aligned to the political calculations of self-interested States and better able to balance the goals of ICrimJ according to the unique needs of each situation.¹⁰⁷

Moreover, as values and morals are functions of societies, for which differences of opinion and priorities exist over time and between regions of the world, Chapter 1 posits that regional initiatives may achieve greater legitimacy, support and compliance from both the concerned State(s) and regional neighbours. These differences, which are clearly manifested in the fields of collective security and international human rights law, are not absent in ICL.¹⁰⁸ The logic of cooperation then points further towards regional enforcement of agreed standards or measures when regional initiatives additionally function as an effective monitor and honest broker between the conflicting groups. Although they are recognised as occupying the same space being discussed – between the international and national, hybrid/internationalised courts are noted to typically be not only *ad hoc* but importantly also *post hoc*. As such, these judicial bodies are unable to halt or de-escalate the perpetration of international crimes, let alone prevent them with enforceable legal action. The proposal is instead to gradually but eventually establish a permanent regional mechanism that can focus on more than just *post-hoc* justice, and include elements of avoidance, prevention and deterrence.¹⁰⁹ Akhavan points out

¹⁰⁶ Jan Aarte Scholte, ‘Global civil society’, in Ngaire Woods, ed., *The political economy of globalization* (London: Macmillan, 2000), at 185.

¹⁰⁷ Where there is a struggle over jurisdiction or the determination of guilt or innocence, recognising the political arena as a “space of unequal contests within materially unequal spheres of power” is then important. Kamari Clarke, *Fictions of Justice – The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge: Cambridge University Press, 2009), at 7.

¹⁰⁸ For example, Goldstone notes that there is “great diversity across the many peoples of the world ... in their conceptions of the right and the good, and of justice and the rule of law”. Goldstone, *supra* n.94, at 20.

¹⁰⁹ In this vein, Luban contends that “what matters most is not punishing crimes but preventing them” by acculturating people to the law. Luban, *supra* n.101, at 511.

that not only must ICrimJ be part of a broader set of tools to confront mass atrocities, but “the first priority must always be prevention”.¹¹⁰ In this regard, the regionalisation of ICrimJ is a theoretically possible, practically viable and politically acceptable approach that can fill a existing gap in the international criminal justice system.

The first section of Chapter 2 then briefly examines the continuously evolving system of ICrimJ to understand why regional arrangements have so far been overlooked. The general predilection for a universal approach in terms of coverage and application, as manifested in the pursuit of an international court, is patently understood.¹¹¹ The fear and suspicion that surrounds regional initiatives, such as threats to international efforts and fragmentation of international law, are also noted. Nevertheless, the chapter recognises that the global character and importance of most issues are often over-exaggerated, and their relevance and effects typically only surface within specific regions. Almost every country has therefore addressed the challenges of globalisation in part through regional policy responses.¹¹² Indeed, States are recognised to find it politically more viable to construct regional groupings based on a common culture, shared history, homogeneity of social systems and values, and/or convergence on political and security interests. More importantly, the chapter highlights the positivist reality that States are still loathe to relinquish their sovereign rights. While absolute sovereignty over the prosecution of core international crimes has been particularly challenged by the establishment of the ICC, the development and effective enforcement of ICL nevertheless still remain largely within the control of States. The idea of regional mechanisms for ICrimJ therefore has political currency and theoretical appeal to self-interested sovereign States.¹¹³ Not only will such initiatives place enforcement of ICL within each geographic area clearly in the hands of the regional countries, but they will crucially allow for and take into account

¹¹⁰ Payam Akhavan, “The Rise, and Fall, and Rise, of International Criminal Justice”, *Journal of International Criminal Justice* 11 (2013): 527-536, at 531.

¹¹¹ Richard Burchill, “Dealing with International Crime at the Regional Level” in Boister, *supra* n.18, at 33.

¹¹² Victor Bulmer-Thomas, “Regional Integration in Latin America and the Caribbean”, *Bulletin of Latin American Research*, 20 (2001): 360-369, at 363.

¹¹³ By adopting an IR theory-based analytical framework, the regionalisation of ICrimJ is also firmly grounded in terms of how and why States would accept their adoption. From a neorealist perspective, it makes little sense to sacrifice sovereignty to promote ICrimJ and enforce ICL unless supporting it would confer some relative advantage or opposing it would entail some relative costs. Hence, the regionalisation of ICrimJ must entice States to favour regional cooperation over limiting the development of ICL. Alternatively, neoliberal institutionalism believes that States will cooperate if it produces absolute gains. The more that regional cooperation on ICrimJ serves State interests, its legitimacy and support from States will then be greater.

regional legal norms and political considerations.

Given that regional mechanisms have featured significantly in the post-Cold War collective security agenda, the immediate question is whether regionalisation of ICrimJ can be understood from a collective security perspective. This is particularly pertinent since the UNSC decided to establish *ad hoc* international criminal tribunals, as a non-military measure authorised under Chapter VII of the UN Charter, to address threats to international peace and security. Regarding the association between ICrimJ and human rights, it is acknowledged that ICL was developed to meet the immediate post-war requirement of delivering justice and punishing war criminals. An underlying aim is then to deter a set of crimes, which are in fact large-scale violations of the fundamental human rights. Focus will be given to collective security law and human rights law given the parallels between ICrimJ with the maintenance of international peace and security, as well as the protection of persons against massive human rights violations.¹¹⁴

In this connection, Chapter 3 considers how regional initiatives in the fields of collective security law and human rights law may hold valuable insights and transferrable best practices for conceptualising and implementing the regionalisation of ICrimJ, particularly within the ASEAN regional construct. It will also examine the development of the ASEAN Intergovernmental Commission on Human Rights (AICHR) to glean lessons about the potential promises and pitfalls of implementing a regional ICrimJ approach in Southeast Asia. It must however be pointed out that the aim of Chapter 3 is not to base or justify the notion of ICrimJ on the norms behind collective security or human rights. Instead, it focuses on the level of the execution of substantive law. In this regard, collective security law and human rights law can proffer much to the discussion on regionalising ICrimJ because they are more mature in terms of theory and application. The reality of whether ICL can be enforced at the regional level turns on the advantages and disadvantages presented to States in their particular situation. The focused study on the ASEAN region thus situates the ideas discussed in this research. Chapter 3 broadly looks at whether the general concern of eroding State sovereignty and specific regional factors like the “ASEAN way” of

¹¹⁴ In terms of transitional justice, a regional approach was also more likely to achieve “the goals of long-term peace, stability, and respect for human rights within the region”. Matingai Sirleaf, “Regional Approach to Transitional Justice? Examining the Special Court for Sierra Leone and the Truth & Reconciliation Commission for Liberia”, *Florida Journal of International Law* 21 (2009): 209-284 at 280.

managing disputes without adversarial or litigious conflict are preventing ASEAN countries from ratifying the Rome Statute. This is particularly important since the objectives of the research are not purely academic, and it is hoped that some practical policy recommendations to further ICrimJ, strengthen ICL, and enable their institutions to gain greater acceptance by States and function more effectively will emerge. In terms of the possible relationship with the ICC, an inherent question is whether regional organisations like ASEAN may adopt different mandates or must operate in sync with it. A further issue that is discussed will be whether regional mechanisms require the authorisation or moral legitimacy of the Court to act.

Based on a discussion of the goals of ICL, Chapter 4 then determines the form(s) of a regional mechanism that would be most effective and realistic within the context of Southeast Asia. In particular, it deliberates whether a strict and formalistic conception of ICrimJ will overlook the fact that States respond differently to various legal, political and economic pressures. While criminal prosecution and sanctions must remain as an important and integral part of any alternative ICrimJ mechanism, the chapter questions whether an over-emphasis on criminal trials may neglect the factors that foster the mass violence of international crimes, as well as those required to restore regional peace and security.¹¹⁵ Given that retributive justice and criminal trials may not always effectively sanction and deter atrocity, let alone protect and maintain peace and security,¹¹⁶ it also examines informal and non-penal modalities that would not only serve (non-Western) State interests but also reflect notions of justice from other regions of the world.

Discussion about the plausibility of regionalising ICrimJ within the region must however unequivocally take into account ASEAN's history and trajectory. As the existing international framework focused on the ICC is unlikely to radically change regional attitudes in the near future, Southeast Asia arguably deserves an indigenous ASEAN-based mechanism to promote ICrimJ.¹¹⁷ Given recent developments within

¹¹⁵ In some situations, support for indicted individuals may even increase, especially if they portray themselves as “victims of politicised justice” being prosecuted by a foreign court. Akhavan, *supra* n.110, at 532.

¹¹⁶ Clark stresses that “justice entails far more than simply retribution”, and contends that criminal courts can only contribute to peace if there is a comprehensive approach to justice that is more than just trials. Janine Clark, “Peace, Justice and the International Criminal Court: Limitations and Possibilities”, *Journal of International Criminal Justice* 9 (2011): 521-545, at 521.

¹¹⁷ Various considerations have been proffered by the eight non-party States for not ratifying the Rome Statute, including: (1) the concern of political manipulation; (2) the argument that State sovereignty is jeopardised by the ICC acting without prior State consent; and (3) pressure from the US. See discussion in Chapter 3.

the sub-regional organisation, especially the creation of the AICHR, this may not be as impossible as it may sound. Furthermore, AMS have already had much experience in collectively addressing issues of criminal justice, and the region has even emerged as a leader in responses to transnational crimes like trafficking in persons. Chapter 4 will however also look at the practice of accommodation and seeking consensus in Southeast Asia, and considers the potential promises and pitfalls of a regional ICrimJ mechanism. A further question would be how it can operate without duplicating or conflicting with efforts at the international or national levels.

Besides differing conceptions of and methods of achieving justice, different regions may also be plagued by different types of harmful criminal activity. As such, Chapter 5 will deliberate what AMS may deem as acts to be prohibited under ICL,¹¹⁸ particularly through a more targeted route as ‘regional crimes’.¹¹⁹ The research does not however aim to provide a definition, legal or otherwise, for either an international or regional crime. Instead, it intends to theorise what raises a crime to the level that it may be considered by a regional community to be a regional crime, based on how the international community has determined an act to be an international crime. The requirements for regional crimes clearly cannot be simply derived from the cross-border nature and effects of the conduct, or that cooperation between countries in Southeast Asia is required to tackle the problem. The chapter will therefore survey the concept of an international crime and posit how the notion of a regional crime can be best developed, bearing in mind that it must appeal to self-interested sovereign States. To be of greatest practical viability and political acceptability to self-interested States, it is proposed that the doctrinal standard for regional crimes closely mirrors that of international crimes derived from ILC deliberations, but is centred within a regional rather than a global setting. In this regard, emphasis falls on two key criteria: (1) regional community recognition; and (2) extreme seriousness within a regional context. Using these two criteria, the chapter will identify some acts, beyond the core international crimes, that may constitute and be labelled as regional crimes by the countries of Southeast Asia.

¹¹⁸ There has been an informal proposal by the Netherlands for the inclusion of the crime of terrorism in the Rome Statute. Given the absence of a generally accepted definition of terrorism, the Netherlands proposed to use the same approach accepted for the crime of aggression, i.e. include the crime of terrorism in the list of crimes laid down in Article 5(1), of the Rome Statute, while at the same time postponing the exercise of jurisdiction over this crime until a definition and conditions for the exercise of jurisdiction is agreed upon.

¹¹⁹ Burchill notes that the crimes under the ICC are currently “not the most prevalent forms of international criminal activity” of concern to States. Burchill, *supra* n.111, at 46.

Apart from advancing ICrimJ in Southeast Asia, this research also hopes to develop some general conclusions about the theoretical viability and practical appeal of a regional approach. AMS are known to be vocal and fiercely protective of the notions of State sovereignty and non-interference in the domestic affairs of the neighbouring States. Hence, if an institutionalised regional initiative or less formal mechanism can be implemented in Southeast Asia, key lessons may be learnt for the development of ICrimJ in other regions. While it is then tempting to paint the possibility of regionalising ICrimJ with a broad brush, it is recognised that there is immense diversity both in terms of what justice means in different geographic areas, as well as the nature of the threats and types of crimes that plague various parts of the world. Indeed, problems like piracy may be particularly serious in one region but possibly non-existent in another. Separately, the political and strategic incentives for collective action by regional groupings of States to enforce ICL will also differ greatly. Specific conclusions about the prospect of regionalising ICrimJ in a geographic region can therefore be attained only from individualised examination.¹²⁰

Nevertheless, the research aims to show that ICrimJ can be further promoted and protected both by recognising theoretical variants in different regions, and through the regionalisation of ICL in terms of regional enforcement mechanisms or lists of crimes. The contribution of regionalism to the advancement of ICrimJ will therefore be in both normative and practical terms. Increased focus on regional solutions will not only have practical benefits in terms of raising awareness of ICrimJ issues, but will also provide significant normative developments for ICL by both requiring and providing a deeper grasp of different regional considerations and perspectives. Regional initiatives will thus support the advancement of ICrimJ and enforcement of ICL by ensuring that fundamental norms are recognised and upheld while allowing for diversity in approach.¹²¹

It must be reiterated that the research does not assume or argue that ICrimJ in its current form is not viable and important. Rather, it considers how the existing international framework can accommodate other avenues that may be willing and able to enforce ICL with regularity. The research conceptualises complementary,

¹²⁰ In this regard, the prospect of regionalising ICrimJ in Southeast Asia is examined in detail in this research.

¹²¹ For a discussion, see Charles Jones, *Global Justice: Defending Cosmopolitanism* (Oxford: Oxford University Press, 1999), at 174-5.

legitimate and politically acceptable regional solutions to effectively redress and respond to future instances of heinous and egregious acts that constitute international and regional crimes. A suggested follow-up to this dissertation is an analysis of the appeal of a regional ICrimJ mechanism in other regions of the world. This is pertinent because the AU has decided to expand the mandate of the African Court of Human and Peoples' Rights (AfCHPR) to try international crimes, in light of the ICC indictment and prosecution of current Kenyan President Uhuru Kenyatta and Vice President William Ruto.¹²²

¹²² See further discussion in Chapter 2.

CHAPTER 1
REGIONALISING INTERNATIONAL CRIMINAL JUSTICE – EXPLORING
THE ROAD BETWEEN INTERNATIONAL AND DOMESTIC OPTIONS

The architects of the modern ICrimJ system have done much to develop ICL and its institutions, with the creation of an independent permanent ICC being an especially important accomplishment. Yet, this achievement must not be seen as an end in itself, let alone the end of the road for the evolution of ICrimJ,¹ especially since the present set of ICrimJ institutions will only be able to sporadically and selectively hold perpetrators of core international crimes individually accountable. Akhavan highlights that the inability to arrest and prosecute accused individuals has then not been a failure of ICrimJ but of political will.² Although globalisation has led to an international environment that is less state-centric and more interdependent, claims about the decline of state sovereignty are somewhat exaggerated. While intergovernmental organisations and non-governmental actors have grown in influence, States undoubtedly remain the final arbiters on international affairs. Delmas-Marty thus concludes that the ICC remains “weakened by policies that remain dominated by a sovereign model”, resulting in ambiguities between the Court’s legal and political underpinnings.³ Although there is universal support for the denunciation and accountability of perpetrators of core international crimes, there is no universal application and enforcement of ICL. The modalities and objectives of ICrimJ currently therefore resemble a patchwork rather than a complete and absolute system. International, national and hybrid courts may also not always represent the best way to achieve the goals of ICrimJ, and should not be uncritically accepted as exclusive avenues to address international crimes. Thus, there may be benefits for States to adding another layer of location (between global and local justice) for mechanisms of accountability.

¹ Indeed, while the “euphoria” surrounding the ICC’s establishment was understandable, it still left open the question of “the efficacy of managing massive atrocities in distant lands within the rarified confines of international legal process”. Payam Akhavan, “The International Criminal Court in Context: Mediating the Global and Local in the Age of Accountability”, *American Journal of International Law* 97 (2003):712-721, at 712.

² Payam Akhavan, “The Rise, and Fall, and Rise, of International Criminal Justice”, *Journal of International Criminal Justice* 11 (2013): 527-536, at 530.

³ Mireille Delmas-Marty, “Ambiguities and Lacunae: The International Criminal Court Ten Years on”, *Journal of International Criminal Justice* 11 (2013): 553-561, at 553.

Viewed with a state-centric lens, the principles behind ICrimJ and its enforcement can clearly be tied to conflict management and the maintenance of peace.⁴ Notably, there has already been an increasing shift towards regional efforts to prevent or address breaches of the peace, and to enforce some collective dictate to the belligerents.⁵ Several reasons for this exist. First, the Cold War that largely subordinated regional institutions and efforts to the direction and interests of the two superpowers has ended. As a result, some regions have been left with a power vacuum and presented with an opportunity to push a regional agenda.⁶ Second, given the changes to the geopolitical and security environment, regional conflicts less directly affect the interests of distant hegemony and are more likely to be addressed regionally.⁷ Besides adjustments to national strategic doctrines, domestic support within such States for humanitarian intervention in faraway places has also fallen. Hence, global powers have developed a preference not to get involved and allow conflicts, which are increasingly regional in nature, to be managed at the regional level.⁸ Third, failures or inaction by the international community, particularly at the UN, reveal the limitations of global efforts and prompted a search for alternatives within the affected regions.⁹

It is also worth recalling that the post-WWII system embodied by the UN actually places an importance in regional approaches to the peaceful settlement of disputes.¹⁰ Article 33 of the UN Charter in fact requires States to, *inter alia*, “resort to regional agencies or arrangements” to resolve their conflicts. Article 52 then

⁴ Conflict management has historically been used to build communities “characterised by shared notions of interstate and domestic justice”. Joseph Lepage, “Regionalism in the Post-Cold War Era”, in Paul Diehl and Joseph Lepage, eds., *Regional Conflict Management* (Oxford: Rowman and Littlefield Publishers, 2003), at 22.

⁵ For example, the AU and ECOWAS have played an increasing role in breaches of the peace in Africa, while the EU and NATO have intervened in Bosnia and Herzegovina, as well as conflicts in Afghanistan and the Congo.

⁶ The decreased external political and economic influence after the Cold War also led to a new cost-benefit structure in regional relations. Etel Solingen, *Regional Orders at Century's Dawn* (New Jersey: Princeton University Press, 1998), at 3.

⁷ David Lake and Patrick Morgan, “The New Regionalism in Security Affairs”, in David Lake and Patrick Morgan, eds., *Regional Orders: Building Security in a New World* (University Park: Pennsylvania State University Press, 1997), at 6.

⁸ Edward Kolodziej, “Modeling International Security”, in *Resolving Regional Conflicts*, ed. Roger Kanet (Urbana: University of Illinois Press, 1998).

⁹ The development of regional institutions “poised to adopt conflict management roles” has then paralleled the search for alternatives to UN efforts. Paul Diehl, “Introduction”, in Diehl, *supra* n.4 at 2.

¹⁰ Due to pressure from Latin American countries that wanted to retain aspects of the inter-American system, the UN Charter provides for the right of regional action to maintain peace and security. For details, see Inis Claude, Jr., “The OAS, the UN, and the United States”, in Richard Falk and Saul Mendlovitz, eds., *Regional Politics and World Order* (San Francisco: W H Freeman and Co., 1973), at 270-3.

recognises that the maintenance of international peace and security are “appropriate for regional action” and encourages the management and pacific settlement of local disputes through regional arrangements, while Article 53(1) even states that the UNSC may “utilise such regional arrangements or agencies” for enforcement action.¹¹

There has been a plethora of research and study on the substantive crimes, the formation and independence of various ICrimJ institutions, as well as the related impact on transitional and restorative justice.¹² However, little scholarship has been undertaken in considering the regionalisation of ICrimJ, with only cursory and isolated analysis existing on regional options to the goals of protecting peoples against atrocities and ensuring international (and regional) peace and security.¹³ Chapter 1 therefore aims to explore a principled middle ground between international and domestic mechanisms, and address the question of whether the regionalisation of ICrimJ is theoretically possible. It will examine how a regional approach may in certain situations not only better suit the theoretical objectives of ICrimJ, but in practice also achieve more consistent and effective enforcement of ICL. It further considers how well ICrimJ is being upheld in practice at the international and national levels, and if a regional approach may sometimes be superior. The underlying question is whether furthering ICrimJ and enforcing ICL through regional initiatives can serve the interest of sovereign and equal States, especially those not swayed by messages based on morality and preventing impunity. The next section thus first examines whether a regional approach will not only provide a viable alternative route for the consistent enforcement of ICL, but also serve the interests of States by affording the inclusiveness of local value systems and notions of justice, as well as sensitivity to practical needs and conditions on the ground.

¹¹ Although the definition of a region is not provided by the UN Charter, it hints that shared interests primarily exist among States that are geographically close. This is similar to the basic understanding of regions proposed in the Introduction. Tom Farer, “The Role of Regional Collective Security Arrangements”, *Collective Security in a Changing World*, ed. Thomas Weiss (Boulder: Lynne Rienner, 1993), at 161-2.

¹² For a broad discussion, see Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, 2nd ed. (Cambridge: Cambridge University Press, 2011); Antonio Cassese, *International Criminal Law*, 3rd ed. (Oxford: Oxford University Press, 2012); and William Schabas and Nadia Bernaz, eds., *Routledge Handbook of International Criminal Law* (Oxon: Routledge, 2013).

¹³ For example, see William Burke-White, “Regionalisation of International Criminal Law Enforcement: A Preliminary Exploration”, *Texas International Law Journal* 38 (2003): 729-761; and Matiangai Sirleaf, “Regional Approach to Transitional Justice? Examining the Special Court for Sierra Leone and the Truth & Reconciliation Commission for Liberia”, *Florida Journal of International Law* 21 (2009): 209-284.

1.1 Regionalising ICrimJ – Possible Acceptance by States

The current ICrimJ system and criminal responsibility of individuals were born from the ashes of WWII.¹⁴ Cast by the international community as heinous in their nature, certain acts perpetrated during the war were not only considered crimes against the immediate victims, but also crimes against the whole of mankind.¹⁵ As various violations of human dignity were sanctioned as breaches of universal norms, the post-WWII legal paradigm heralded an important break from the monopoly of national jurisdictions over the prosecution of core international crimes.¹⁶ Furthermore, individuals were also deemed responsible for these atrocities and could be held personally accountable.¹⁷ Criminal prosecutions under the nascent ICL were then envisaged to highlight the imperative of justice and law, as well as to underscore the culpability of the accused.¹⁸ These factors contributed to the creation of the International Military Tribunal (IMT)¹⁹ at Nuremberg and the International Military Tribunal for the Far East (IMTFE)²⁰ at Tokyo.

¹⁴ International rules of warfare by low-level combatants had however already been developed, under the Hague Conventions for the Peaceful Settlement of International Disputes (1899) (1907), to proscribe war crimes and to protect civilians during times of war. Howard Ball, *Prosecuting War Crimes and Genocide: The Twentieth-Century Experience* (Lawrence: University of Kansas Press, 1999), at 17.

¹⁵ Although arguments about the need to prosecute war criminals existed at least since WWI, the legalist approach only “came of age” with the Nuremberg tribunal. Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000), at 280.

¹⁶ The Nuremberg and Tokyo tribunals represented the end of the state-centric international law that had been dominant since the 18th century. Prior to their creation, individuals were prosecuted by their own States in domestic courts or military court-martials for misconduct in international armed conflict. Steven Ratner, Jason Abrams and James Bischoff, *Accountability for Human Rights Atrocities in International Law – Beyond the Nuremberg Legacy*, 3rd ed. (Oxford: Oxford University Press, 2009), at 5.

¹⁷ There is a general consensus that standards of individual criminal responsibility were further developed regarding the rejection of obedience to superior orders as a defence argument, and the accountability of senior and other state agents. On the history of collective criminality and individual responsibility for war crimes, see Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague: T.M.C. Asser Press, 2003), at 14-39.

¹⁸ This development is partly due to the fact that the notion of state criminality does not exist. The ICJ had confirmed that, as a matter of principle, international law does not recognise the criminal responsibility of the State. See Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, General List No. 91, at paras.142-201.

¹⁹ In pursuance to the London Agreement of 8 August 1945, the governments of the US, France, UK and Soviet Union established the IMT “for the just and prompt trial and punishment of the major war criminals of the European Axis”. See Article 1 of the IMT Charter, at <http://avalon.law.yale.edu/imt/imtconst.asp>.

²⁰ The IMTFE was established through a special proclamation by the Supreme Allied Commander “for the just and prompt trial and punishment of the major war criminals in the Far East”. See Article 1 of the IMTFE Charter at <http://www.ibiblio.org/hyperwar/PTO/IMTFE/IMTFE-A5.html>.

Employed to supersede the sacrosanct principles of state sovereignty and immunity, the rationale of ICrimJ for States has since been preservation of international peace and security, as well as punishment and deterrence of international crimes.²¹ When the UNSC adopted Resolution 1593 (2005) and invoked its power under Article 13(b) of the Rome Statute to refer the conflict in Sudan to the ICC,²² it was then because the international community felt that the gross human rights violations in Darfur demanded a response in the interests of both justice and peace.²³ Although preventing impunity has been often cited as another goal of ICrimJ, it is essentially a means of deterrence and part of the overall objective to prevent atrocities. Indeed, the Preamble of the Rome Statute not only recognises that atrocities “threaten the peace, security and well-being of the world”, but also states that the international community was determined “to put an end to impunity for the perpetrators of these crimes and *thus* to contribute to the prevention of such crimes” [Emphasis added].²⁴ While Goldstone notes that the necessity of denying impunity to war criminals “has never been greater”, he thus acknowledges that “[u]ltimately the highest purpose of international criminal law is to ensure that these crimes never happen again”.²⁵

As a corollary, criminal prosecutions of individuals have since developed a

²¹ For example, it was determined in UNSC Resolution 827 (1993) that the situation in the former Yugoslavia constituted “a threat to international peace and security” and the ICTY was established to put an end to the widespread and flagrant violations of international humanitarian law (IHL) and “to bring to justice the persons who are responsible for them”. The UNSC likewise stated in Resolution 995 (1994) that the situation in Rwanda was “a threat to international peace and security”, and established the ICTR to put an end to the genocide and other systematic, widespread and flagrant IHL violations and “to bring to justice the persons who are responsible for them”. It was added that prosecuting perpetrators would also contribute to the process of national reconciliation, the restoration and maintenance of peace, and ensure that such violations are halted and effectively redressed. See UN Security Council resolution 827 of 25 May 1993, UN Doc. S/Res/827 (1993); and UN Security Council resolution 955 of 8 November 1994, UN Doc. S/Res/955 (1994).

²² See UN Security Council resolution 1593 of 31 Mar 2005, UN Doc. S/Res/1593 (2005). For a discussion, see Robert Cryer, “Sudan, Resolution 1593, and International Criminal Justice”, *Leiden Journal of International Law* 19 (2006):195-222.

²³ The UNSC found that the situation in the Sudan constituted a threat to international peace and security and therefore met the criteria for its intervention under Chapter VII (Article 39) of the UN Charter. It also highlighted the belief that prosecuting the perpetrators of international crimes in Darfur was important for the restoration of peace and stability. A UN report on Darfur noted that the ICC “was established with an eye to crimes likely to threaten peace and security”, and that the investigation and prosecution of crimes perpetrated in Darfur would “be conducive, or contribute to, peace and stability” both in Sudan and the region. See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General: Pursuant to Security Council Resolution 1564 of 18 September 2004, 25 Jan 2005, at paras. 572 and 648.

²⁴ See Preamble, ICC Statute.

²⁵ Richard Goldstone, *South-East Asia and International Criminal Law* (Oslo: Torkel Opsahl Academic EPublisher, 2011), at 3 and 14.

stranglehold as the preferred mechanism for advancing ICrimJ.²⁶ This is illustrated by numerous domestic prosecutions in the second half of the 20th century,²⁷ and by the creation of both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) under UNSC Chapter VII resolutions.²⁸ With the establishment of the ICC and its principle of complementarity,²⁹ this position has been entrenched even further as criminal trials are conducted by either the Court or national courts.³⁰ The promotion of individual accountability for core international crimes through the trial process, with imprisonment as the predominant punishment for those found guilty, has accordingly gained substantial support from both States and legal scholars.³¹ Indeed, it was even remarked that almost everyone had “fallen under the spell of international criminal law”, and there was a belief that the interests of justice and order could be reconciled by a formal legal process.³²

Formal trials and penal sentences have however become “the preferred modalities to promote justice for atrocity”³³ primarily because the modern ICrimJ system is premised upon the ‘liberal legalism’³⁴ belonging to Western criminal law.³⁵

²⁶ The structure and process of the public trial has since not only been a symbol of ICrimJ in an institutional sense, but also assumed to legitimise it. Mark Findlay and Ralph Henham, *Transforming International Criminal Justice: Retributive and Restorative Justice in the Trial Process* (Devon: Willan Publishing, 2005), at xix.

²⁷ The Eichmann trial conducted by Israel in 1961 was an example of the continued desire to bring to justice Nazi perpetrators of genocide and crimes against humanity.

²⁸ See UN Security Council resolution 827 of 25 May 1993, UN Doc. S/Res/827 (1993); and UN Security Council resolution 955 of 8 November 1994, UN Doc. S/Res/955 (1994).

²⁹ Under its complementarity regime, the ICC will assume jurisdiction only when the State concerned is unable or unwilling genuinely to investigate or prosecute. However, it has been argued that the ICC then indirectly exerts pressures on domestic legal systems to copy its processes and punishments, lest indigenous modalities of justice and accountability mechanisms are deemed unacceptable.

³⁰ Indeed, the Preamble of the ICC Statute intimates that criminal trials are the preferred mechanism to punish perpetrators of the “grave” and “most serious crimes of concern to the international community” that threaten international peace, security and well-being. See Preamble, ICC Statute.

³¹ Some arguments for prosecuting perpetrators of core international crimes include: (1) establishing individual responsibility; (2) dissipating the call for revenge by victims; (3) facilitating reconciliation; and (4) establishing a fully reliable record of the atrocities. Antonio Cassese, “Reflections on International Criminal Justice”, *The Modern Law Review* 61 (1998):1-10, at 6.

³² Jan Klabbers, “Just Revenge? The Deterrence Argument in International Criminal Law”, *Finnish Yearbook of International Law* 12 (2001): 249-267, at 250; and Frédéric Mégret, “Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project”, *Finnish Yearbook of International Law* 12 (2001):193-247, at 201.

³³ Mark Drumbl, *Atrocity, Punishment and International Law* (Cambridge: Cambridge University Press, 2007), at 5.

³⁴ Fletcher defines ‘liberal legalism’, which originates in and underpins the legal structures of Western societies, as the legal principles and values that locates the individual “as the central unit of analysis for the purposes of sanctioning violation of social norms”. Laurel Fletcher, “From Indifference to Engagement: Bystanders and International Criminal Justice”, *Michigan Journal of International Law* 26 (2005) 1013-1095, at 1031.

³⁵ Ratner, *supra* n.16, at 26.

It has also resulted in development of two distinct and not necessarily associated victim groups: (1) the actual targets of the atrocities who are directly affected; and (2) the indirectly affected international community whose peace and security has been threatened. This creates a situation where there may be inconsistent definitions and objectives of justice between stakeholders, as well as sharply divergent ideas about the best forum and method to administer it.³⁶ It is further complicated by differing priorities for peace and justice that may exist in different regional circumstances. There will be a discussion in Chapter 4 about the dichotomy between the goals of retributive and restorative justice, and which may best serve the objectives of ICrimJ in different circumstances, particularly in the context of Southeast Asia.³⁷ However, the research is not intended to be a critique of either Western philosophical traditions of legalism or liberalism. The point is to instead stress that the dominance of these modalities and rationales of justice has resulted in them being transplanted to other regions of the world, where indigenous justice mechanisms and goals have been gradually replaced.³⁸

In this vein, the normalisation of ICL and creation of ICrimJ institutions has also led domestic legal systems to mainly focus on core international crimes.³⁹ As evident from the national efforts to implement ICC-related legislation, little consideration is then given to other crimes that may be relevant to different regions of the world.⁴⁰ Although it has been internationalised and practiced around the world,⁴¹

³⁶ Indeed, what may be important for the international community is to ensure “legal justice” and address any breakdown or corruption of the rule of law that occurs during conflicts. This differs from the need for “rectificatory justice” arising from the direct harm suffered by victims, and “distributive justice” to tackle structural and systemic problems underlying conflict. Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge: Polity Press, 2002), at 5.

³⁷ See discussion in Chapter 4.

³⁸ Mani posits that Western-trained international lawyers “have largely referred to and replicated their own legal systems, rather than catered to and built on local realities and needs”. Mani, *supra* n.36, at 81.

³⁹ This circumscription partly follows from the report by the UN Secretary-General on the creation of the ICTY, which stated that the tribunal would only “apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise”. See Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (1993), at para 34.

⁴⁰ Based on the insights gained from the concept of an international crime, Chapter 5 will theorise what can constitute a regional crime, particularly in the context of Southeast Asia.

⁴¹ Drumbl defines this process of universal, world-wide enforcement of a set of (primarily Western) principles via international institutions and authorities as “globalitarianism”. Mark Drumbl, “Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda”, *New York University Law Review* 75 (2000):1221-1326, at 1312; and Mark Drumbl, “Sclerosis: Retributive Justice and the Rwandan Genocide”, *Punishment and Society* 2 (2000):287-307, at 296.

ICL is clearly not collectively arrived at or inherently universal.⁴² Neither is it value neutral,⁴³ and Chuter even argues that the vocabulary and concepts of ICL are “culturally specific, constructed and manipulated by a very small number of countries”.⁴⁴ An illustration of the culturally specific nature of modern ICL is that, while intoxication may provide for the exclusion of responsibility for a crime before the ICC,⁴⁵ claims that such a defence is universally accepted is questionable.⁴⁶ Since the consumption of alcohol is itself not permitted in many Islamic societies, particularly in the Arab region, it may even constitute “an aggravating rather than a mitigating factor”.⁴⁷

Regardless of whether this claim of cultural specificity is accepted, however, the danger and irony of not considering other regional norms, values, and legal precepts (including the purpose of justice, criminal liability and appropriate sanctions) must still be acknowledged.⁴⁸ Accounting for such divergences would undoubtedly increase the legitimacy of the chosen process and acceptance of those most affected. By excluding them, ICL may not be as well-received in the non-Western developing parts of the world where it has been (and is most likely to be) employed.⁴⁹ This could also lead to criticisms that ICL is another form of Western political and legal

⁴² While references to the laws of armed conflict are not a purely Western tradition and can be found in Chinese and Indian writings, thereby “demonstrating their universal moral foundation”, Goldstone nevertheless stresses that they “were largely based on reciprocity”. As such, they are actually more reflective of strategic and political calculations of the State than an emphasis on morality *per se*. At most, it may be said that any predilection for sparing the lives of civilians and non-combatants depended on the different regional cultures of States. This may in turn provide a strong argument for the regionalisation of ICrimJ to better reflect different regional legal norms, values, and enforcement options. Goldstone, *supra* n.25, at 3.

⁴³ The assumption of universal agreement thus imposed “an ethnocentric vision of international order”. Judith Shklar, *Legalism: Law, Morals and Political Trials* (Massachusetts: Harvard University Press, 1986) at 128.

⁴⁴ David Chuter, *War Crimes: Confronting Atrocity in The Modern World* (London: Lynne Rienner Publishers, 2003), at 94-95.

⁴⁵ See Article 31(1)(a) and 31(1)(b) of the ICC Statute; and Geert-Jan Knoops, *Defences in Contemporary International Criminal Law*, 2nd ed. (Leiden: Martinus Nijhoff Publishers, 2008).

⁴⁶ Kai Ambos, “Defences in International Criminal Law”, in Bertram Brown, ed., *Research Handbook on International Criminal Law* (Cheltenham: Elgar, 2011), 305.

⁴⁷ See *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Trial Chamber I Judgement, 2 November 2002, para.706; and Albin Eser, “Article 31 – Grounds for Excluding Criminal Responsibility”, in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed. (Munich: Beck, 2008).

⁴⁸ A major hurdle for the ICrimJ system is “the predominance of Western-generated theories and the absence of non-Western philosophical discourse”, which causes problems in addressing issues in post-conflict developing societies as “Western philosophers are inadequately attuned to the conditions found in non-Western societies”, like the importance of social cohesion over individual liberty. Mani, *supra* n.36, at 47-48.

⁴⁹ For example, the ICrimJ system fails “to recognise cultural relativism and the predominantly authoritarian and undemocratic function of international criminal trials”. Findlay, *supra* n.26, at 256.

imperialism,⁵⁰ or worse a cultural backlash and regional resistance against the endeavour of ICrimJ.

There are already allegations by African countries that the ICC unfairly targets their region,⁵¹ including the disquiet over the ICC indictment of sitting Sudanese President Omar Al-Bashir. Following UNSC Resolution 1593 (2005) referring the Sudan situation to the ICC, and the subsequent arrest warrant issued for President Al-Bashir, the growing perception amongst African leaders is that the Court is no more than a tool of imperialism used only to try individuals from poor African nations and/or Africa is being sacrificed to legitimise the ICC.⁵² Further frustrated with the UNSC's failure to accede to the AU's request to suspend the processes initiated by the ICC against President Al-Bashir under Article 16 of the Rome Statute,⁵³ African States have simply not cooperated with the ICC in respect to his arrest and surrender.⁵⁴ This situation is now further compounded by the Kenyan requests for the suspension of ICC trials,⁵⁵ particularly against current Kenyan President Uhuru

⁵⁰ For example, see Antony Anghie and B.S. Chimni, "Third World Approaches to International Law and Individual Responsibility in Conflicts", *Chinese Journal of International Law* 2 (2003):77-103; and Michael Mandel, "Politics and Human Rights in International Criminal Law: Our Case against NATO and the Lessons to be Learned from It", *Fordham International Law Journal* 25 (2001):95-128, at 96.

⁵¹ AU leaders have often spoken out against the ICC Prosecutor's "misuse of indictments against African leaders" and the Court's "unfair treatment of Africa and Africans". Some commentators note that the Court's focus on Africa has raised "concerns about a politicised justice", while others see the unwillingness or inability of the ICC to investigate Western nations, particularly the US, as hypocrisy undermining the universality of international law. See statement by Chairperson of the AU Executive Council and Ethiopia's Foreign Minister Tedros Adhanom at the 15th Extraordinary Session of the Executive Council of the AU, 11 October 2013, and AU Peace and Security Council Communique (PSC/MIN/Comm (CXLII)), 21 July 2008, para. 3; Mahmood Mamdani, "Darfur, ICC and the New Humanitarian Order: How the ICC's 'responsibility to protect' is being turned into an assertion of neo-colonial domination", *Pambazuka News* 396, at <http://www.pambazuka.org/en/category/features/50568>; and Knox Chitiyo and Lawrence Devlin, "The International Criminal Court and Africa", *Royal United Services Institute Newsbrief* 8 (2008):67-70, at 69.

⁵² Rwandan President Kagame claimed that the ICC is a "new form of imperialism" and "has been put in place only for African countries, only for poor countries", while Benin's President *Thomas Yayi* said that the Court "seems bent on harassing African statesmen" and voiced the feeling that it "is chasing Africa". See *AFP*, "Rwanda's Kagame says ICC Targeting Poor, African Countries", 31 July 2008; and Reuters, "Benin leader warns ICC against "harassing" Africans", 27 September 2008.

⁵³ Despite the repeated AU requests for the UNSC to invoke Article 16 to suspend the processes initiated by the ICC against President Al-Bashir of Sudan, the matter was only debated only once by the UNSC in the context of renewing the UNAMID mandate. See UNSC, 5947th meeting, UN Doc. S/PV.5947, 31 July 2008. For a discussion on the AU concerns about Article 16, see Charles Jalloh, Dapo Akande and Max du Plessis, "Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court", *African Journal of Legal Studies* 4 (2011):5-50.

⁵⁴ For example, President Al-Bashir visited the Democratic Republic of the Congo in February 2014, and ICC Pre-Trial Chamber II found that it had deliberately failed to arrest and surrender him to the ICC. See "Decision on the Cooperation of the Democratic Republic of the Congo regarding Omar Al Bashir's Arrest and Surrender to the Court", Doc. ICC-02/05-01/09, 9 April 2014.

⁵⁵ In October 2013, the AU called for the ICC trials of the Kenyan President and Vice President to be suspended during their terms in office. It stressed that "to safeguard the constitutional order, stability and, integrity of Member States, no charges shall be commenced or continued before any International

Kenyatta and Vice President William Ruto,⁵⁶ and for the cases to be referred cases back to Kenyan courts.⁵⁷

These developments have led to a reassessment by the African region of its association with the Court,⁵⁸ including the alternative of developing a regional initiative to address serious international crimes committed on the continent.⁵⁹ **It is therefore also significant that the AU** decided in 2006 that the case against Hissène Habré⁶⁰ fell within its competence,⁶¹ and had called on Senegal to prosecute the former President of Chad for international crimes “on behalf of Africa”.⁶² *Following years of reluctance by Senegal to prosecute Habré for international crimes, Belgium took the case to the International Court of Justice (ICJ) in February 2009. The Court issued its ruling in the case Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) on 20 July 2012, and unanimously found “that the Republic of Senegal must, without further delay, submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution, if it does not extradite him”.*⁶³

Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office”. The matter was also raised at the ICC ASP in November 2013. See Decision on Africa’s Relationship with the International Criminal Court (ICC), Doc. Ext/Assembly/AU/Dec.1(Oct.2013), Extraordinary Session of the Assembly of the African Union, 12 October 2013, Ethiopia; and Special Segment as requested by the African Union” “Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation”, Doc. ICC-ASP/12/61, 27 November 2013.

⁵⁶ The AU subsequently asked Member States to ensure that proposals for amendments to the ICC Statute, including on Articles 27 (Irrelevance of Official Capacity), were considered by the ICC ASP. See Decision on the Progress Report of the Commission on the Implementation of the Decisions on the International Criminal Court, Doc. Assembly/AU/Dec.493(XXII), Assembly of the African Union, 30-31 January 2014, Ethiopia.

⁵⁷ In September 2013, Kenya’s parliament also voted to withdraw Kenya from the ICC’s jurisdiction.

⁵⁸ Disputes over the proper functioning and scope of the ICC within Africa indicate the “attempt to take initiative from global international criminal justice processes and root them in Africa”. See Kurt Mills, ““Bashir is Dividing Us”: Africa and the International Criminal Court”, *Human Rights Quarterly* 34 (2012): 404-447, at 427.

⁵⁹ See discussion in Chapter 2.

⁶⁰ *Habré is accused of thousands of political killings and systematic torture during his tenure as President of Chad from 1982 to 1990. He subsequently fled to Senegal.*

⁶¹ This was **based on a report** of the Committee of Eminent African Jurists that was established by the AU meeting in Khartoum on 24 January 2006. The Committee had been tasked “to consider all aspects and implications of the Hissène Habré case as well as the options available for his trial”. See Decision on the Hissène Habré Case and the African Union, Doc. Assembly/AU/Dec.103(VI), Assembly of the African Union, Sixth Ordinary Session, 23-24 January 2006, Sudan.

⁶² See Decision on the Hissène Habré Case and the African Union, Doc. Assembly/AU/3(VII), Assembly of the African Union, Seventh Ordinary Session, 1-2 July 2006, Gambia.

⁶³ The majority of judges found that Senegal failed to meet its obligations under Articles 6(2) and 7(1) of the Convention against Torture by not making immediately a preliminary inquiry into the facts relating to Habré’s crimes and by failing to submit to competent authorities for the purpose of prosecution. See *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment of 20 July 2012, at paras.122.

On 24 July 2012, Senegal and the AU then agreed to establish a special court within the Senegalese justice system with only African judges appointed by the AU presiding over his trial and any appeals.⁶⁴ A crucial observation is that Senegal preferred to place Habré at the disposal of a regional organisation to which it belonged, and had rejected plans for the former Chadian President to be prosecuted by a tribunal composed of Senegalese and international judges, akin to the hybrid tribunal in Cambodia.⁶⁵ The agreement creating the Extraordinary African Chambers (EAC) was later signed on 22 August 2012,⁶⁶ with the EAC Statute providing jurisdiction to prosecute “person or persons” most responsible for the crimes of genocide, crimes against humanity, war crimes and torture,⁶⁷ perpetrated in Chad between 7 June 1982 and 1 December 1990.⁶⁸ The EAC’s investigating judges subsequently charged Habré with crimes against humanity, torture and war crimes, and placed him in pre-trial detention on 2 July 2013. Given the ECOWAS Court of Justice decision of 5 November 2013 that it did not have jurisdiction to rule on the legitimacy of the EAC as the latter was created by the treaty between the AU and Senegal,⁶⁹ Habré’s trial should begin in 2015 after allowing sufficient time for the defence and trial judges to prepare themselves.

The success of the EAC will not only bode well for the cause of ICrimJ on the African continent and demonstrate that indigenous regional courts can deliver a fair trial against one of its own, but will also strengthen the AU’s argument and resolve for international crimes committed in Africa to be tried regionally.⁷⁰ Furthermore,

⁶⁴ The shift in the Senegalese stance towards the Habré case may be linked to the regime change after elections in March 2012, and the new government’s efforts to position his prosecution in Senegal as part of its pledge against official impunity, and the corruption and cronyism of the last administration.

⁶⁵ Hybrid tribunals and the Extraordinary Chambers in the Courts of Cambodia (ECCC) are discussed later in this chapter.

⁶⁶ The prosecutors and investigative judges would be nominated by Senegal’s Minister of Justice and appointed by the AU Commission Chairperson. The Trial and Appeals Chambers would then be composed of two judges of Senegalese nationality and a non-Senegalese judge from another Member State of the African Union who shall also serve as President of the Chamber.

⁶⁷ The definitions of these crimes in the AEC Statute are generally similar to those in the ICC statute.

⁶⁸ This corresponds with Habré’s tenure as President. Given that the EAC is an internationalised hybrid tribunal, it complies with the ECOWAS court ruling that Habré had to be tried before a “special ad hoc procedure of an international character” to avoid violating the principle of non-retroactivity. Crucially, the ICC cannot try Habré as it only has jurisdiction over crimes committed after 1 July 2002.

⁶⁹ Habré’s attempted to suspend the EAC proceedings against him by filing a provisional measures application to the ECOWAS Court, on the ground that the EAC was not legitimate. The ECOWAS Court however found that it did not have jurisdiction to rule on the application, and further recognised that the EAC was established within the Senegalese judicial system in conformity to its 2010 decision.

⁷⁰ Habré’s trial will then be the first by an African country of a former head of state of another African country. Sarah Williams, “The Extraordinary African Chambers in the Senegalese Courts: An African Solution to an African Problem?”, *Journal of International Criminal Justice* 11 (2013): 1139-1160, at 1144.

Habré's trial emphasises the viability and importance of a "tiered and complementary system" of ICrimJ.⁷¹ In sum, the African experience reveals that the regionalisation of ICrimJ may better serve the interests of and be favoured by States, whilst proffering an alternative route for the consistent and effective enforcement of ICL. Although these points will be further elaborated upon in comparison to international and national solutions, the flexibility in approaches within regionalism and factors supporting the acceptance by States of a regional approach to ICrimJ are first outlined as a primer.

Firstly, regional norms, values, views on individual liability and criminal sanctions can be injected into the accountability process, making it better attuned in terms of serving justice and winning local acceptance. Secondly, damaging neo-colonialist criticisms and misperceptions of ICL are removed by making it 'home-grown'.⁷² To increase legitimacy and acceptability, a sense of connection and ownership among the societies concerned is required to avoid an initiative being perceived as being imposed by external forces.⁷³ Moreover, giving ownership of the ICrimJ project to regional members ensures that they each serve as a check-and-balance for the collective interests of securing regional peace and justice.⁷⁴

⁷¹ A credible regional judicial mechanism with competence to prosecute international crimes within Africa would then help entrench a strong culture of accountability as envisioned by Article 4(h) of the AU Constitutive Act. See Martin Ewi, "A Litmus Test for Criminal Justice in Africa", Institute for Security Studies, 15 July 2011.

⁷² Due to their experience with colonialism and foreign interventions, various African leaders are wary of externally based ICrimJ regimes, such as the ICC. Rwandan President Kagame opined that with the international court "all the injustices of the past including colonialism, imperialism, keep coming back in different forms". Separately, scholars note that the establishment of the ICTY was "viewed as an assertion of political supremacy over small nations that would not be attempted in relation to big powers", and "ad hoc tribunals created by the Security Council are exemplary cases of the politicisation of criminal justice". See David Kezio-Musoke, "Rwanda: Kagame tells why he is against ICC charging Bashir", *Daily Nation*, 3 August 2008, at www.allafrica.com/stories/200808120157.html; and Dušan Cotič, "Introduction", in Roger Clark and Madeline Sann, eds., *The Prosecution of International Crimes: A Critical Study of the International Tribunal for the Former Yugoslavia* (Somerset: Transaction Publishers, 1996), at 13; and Hans Köchler, *Global Justice or Global Revenge? - International Criminal Justice at the Crossroads* (Verlag Wien: Springer, 2003), at 12.

⁷³ Burchill however recognises that any element of international or supranational authority will be open to criticism that it lacks legitimacy. In this regard, he notes that local communities and national governments even still see the European Union as a foreign force imposing its will with no regard for local concerns and circumstances, even though the regional integration project has been in existence for over 50 years old. Richard Burchill, "Dealing with International Crime at the Regional Level", in Neil Boister and Alberto Costi, eds., *Regionalising International Criminal Law in the Pacific* (Wellington: New Zealand Association for Comparative Law, 2006), at 47.

⁷⁴ Benzings and Bergsmo note that regional initiatives can better foster a "sound balance" between the differing general and particular interests, and will also appear less intrusive when collective action or oversight is required. Markus Benzings and Morten Bergsmo, "Some Tentative Remarks on the

Thirdly, localising the ICrimJ process within the region reduces the theoretical and physical gap between the victims of the atrocities and those who are indirectly affected by the disruption of regional peace and stability. Burke-White notes that regional arrangements are better able to make full and effective use of local knowledge during investigations and prosecutions, thereby fostering a closer connection to the affected communities and individuals.⁷⁵ This is in line with an increasingly important facet of ICrimJ to provide victims the chance to see their tormentors brought to justice.

Fourthly, a regional approach will be better at understanding local dynamics and navigating the peace-justice divide that is different to every post-conflict situation,⁷⁶ and thus probably more effective at achieving the twin goals of ICrimJ.⁷⁷ For example, given the delicate nature of the situation in Sudan, the AU contends that the pursuit of justice is best conducted in ways that support the broader political process and not jeopardise the prospects for reconciliation and peace. While the AU endorses criminal accountability for international crimes, it argues that the comprehensive efforts for long-lasting regional peace must not to be undermined by an ICC push for prosecutions, which “may not be in the interest of the victims and justice” as it may lead to “further suffering for the people of the Sudan and greater destabilisation with far-reaching consequences for the country and the region”.⁷⁸

Lastly, the regionalisation of ICrimJ offers the possibility of expanding the definitions of the universally accepted core crimes to better suit regional needs, as well as including other crimes that may be particularly relevant in the regional context. It would be a travesty if ICrimJ is held hostage to State consensus on what

Relationship between International Criminal Jurisdictions and the International Criminal Court”, in Cesare Romano, André Nollkaemper and Jenn Kleffner, eds., *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford: Oxford University Press, 2004), at 410.

⁷⁵ Burke-White, *supra* n.13, at 734-5

⁷⁶ See Neil MacFarlane and Thomas Weiss, “The United Nations, Regional Organisations, and Human Security”, *Third World Quarterly* 15 (1994):277-295, at 283.

⁷⁷ While it is inconclusive that conflicts will drag out because leaders refuse to surrender in the face of international criminal prosecutions, the prioritisation of peace over justice by political (regional) organisations is understandable because it is accepted that arrest warrants would “make peace negotiations more difficult”. Goldstone, *supra* n.25, at 13-14. See also discussion on the rationale of ICrimJ for States at p.4-5.

⁷⁸ See Report of the African Union High-Level Panel on Darfur (AUPD), AU Doc. No. PSC/AHG/2(CC VII), 29 October 2009, paras. 241-43; Decision of the Meeting of African States Parties to the Rome Statute of the ICC, Doc. Assembly/AU/13(XIII), adopted at the Assembly of the African Union, Thirteenth Ordinary Session, 1 – 3 July 2009, Libya, para. 3; and Communiqué of the 142nd Meeting of the Peace and Security Council, Doc. PSC/MIN/Comm (CXLII), 21 July 2008, at paras. 3, 9 and 11(i).

can constitute a crime under ICL, and a shame if the different regional and local constituencies stop pushing the agenda against crimes that harm them most and begin to coalesce around only a limited number of internationally accepted ‘core crimes’.⁷⁹ Regional initiatives will therefore allow States to overcome the need for unanimity that haunts international treaty law, and proceed on a more localised basis of countries that are interested, willing and able.⁸⁰ Additionally, regional developments can then be an impetus and spur advances in ICrimJ for other regions and States.⁸¹

At this juncture, it is useful to examine how regional arrangements currently fit into the wider institutional and normative structure of international system, and relate to the UN in particular. Despite the increasing presence of regional institutions within the international system and regional mechanisms covering various aspects of international law, their role and impact is not always obvious or consistent.⁸² The League of Nations was, for example, created in the belief that regional groupings of States would lead to competition and conflict.⁸³ This belief in the need for a universal organisation and legal system continued into the creation of the UN, but political realities (including the existence of various regional organization like the Arab League and Organisation of American States) meant that the UN Charter had to consider how regional bodies would fit within the international system.⁸⁴

⁷⁹ It is worth recalling that the genesis of the ICC was a call by Trinidad and Tobago for the creation of an international court to tackle the scourge of illicit drug trafficking. This issue however still remains outside of ICL.

⁸⁰ The difficulty in securing a consistent global agreement to achieve to realise the objective of universality is exemplified by the failure of the League of Nations. Carr noted that while universal approaches may be more appealing and “may be a necessary convenience and valuable symbol”, they struggled with the practical realities of international politics and would be limited in what could be achieved. In this regard, he recognised that regional approaches were more “practical and workable”. See E H Carr, *Nationalism and After* (London: Macmillan, 1945) at 45.

⁸¹ The regionalisation of ICrimJ will inevitably have an impact on ICL at the substantive level (like as regional definitions of core international crimes or new ‘region-based’ crimes), and at the procedural level (like different modalities of justice and varying forms of punishment). The concern about the possible fragmentation of ICL will be discussed in Chapter 3, in the light of how the issue has played out in international human rights law.

⁸² This is partly due to the fact that there is “no well-articulated or uniform understanding” of international law, which is “a field of contestation over meanings, approaches, solutions, remedies”. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi, U.N. Doc. A/CN.4/L.682 (2006), at 254; and Anghie, *supra* n.50, at 101.

⁸³ Article 21 of the League’s Covenant however recognized that all other international agreements, including regional-based instruments, were acceptable so long as they did not contradict the organization’s purposes.

⁸⁴ Burchill notes that there was an intense debate over a universal or possible regional approaches to international organisation during the drafting of the UN Charter, which resulted in compromise language that “demonstrates the overall lack of coherence in dealing with the position of regional arrangements in international law”. Burchill, *supra* n.73, at 37-38.

Under the UN Charter, the role of regional organisations is largely scoped out in Chapter VIII, which permits the maintenance of peace and security by such bodies as appropriate regional actions provided that they are consistent with UN principles and purposes.⁸⁵ States are even expected to “make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies” before approaching the UNSC.⁸⁶ There is also an indirect reference to regional arrangements in Article 56, where the UN member States pledge to uphold the human rights purposes articulated in Article 55 through joint and separate action.⁸⁷ Article 103 however provides that obligations of the UN Charter will prevail in any conflict between the legal obligations of the Charter and any other international treaty. This provision is often seen as a “supremacy clause” that confirms the dominant position of the UN.⁸⁸ That said, if viewed as an interpretation clause, Article 103 may not necessarily subordinate the regional to the universal, but seek to harmonise them and ensure consistency.⁸⁹ Furthermore, some scholars posit that Article 103 only applies to defined legal obligations within the Charter, which differs from the formulation in Chapter VIII that generally refers to regional arrangements acting in a manner consistent with the purposes and principles of the Charter.⁹⁰

The UN started to discuss the role of regional organizations with regards to the promotion and protection of human rights in the late 1970s,⁹¹ and subsequently proposed efforts to strengthen exchanges between the UN and regional intergovernmental bodies dealing with human rights issues. It also invited States “in areas where regional arrangements in the field of human rights do not yet exist” to

⁸⁵ Art 52(1), UN Charter.

⁸⁶ Art 52(2), UN Charter.

⁸⁷ Burchill argues that this leaves it open for groups of states to create their own regional arrangements for the promotion and protection of human rights in line with UN action in this area. Burchill, *supra* n.73, at 39.

⁸⁸ Rain Liivoja, “The Scope of the Supremacy Clause of the United Nations Charter”, *International and Comparative Law Quarterly* 57 (2008): 583-612, at 584.

⁸⁹ As circumstances will defer, it has been argued that there is no logical reason for the UN Charter to be given absolute primacy in all inter-state affairs. See Inter-American Institute of International Legal Studies, *The Inter-American System: Its Development and Strengthening* (York, Oceana Publications, 1966), at 3.

⁹⁰ See Waldemar Hummer and Michael Schweitzer, “Article 52”, in B Simma, ed., *The Charter of the United Nations: A Commentary*, 2nd ed., (Oxford: Oxford University Press, 2002), at 825-826.

⁹¹ In 1977, the UN General Assembly acknowledged “the importance of encouraging regional cooperation for the promotion and protection of human rights and freedoms”, and requested the Secretary-General to organise “seminars for the purpose of discussing the usefulness and advisability of the establishment of regional commission” in regions where none existed. See UN General Assembly resolution 32/127, Regional Arrangements for the Promotion and Protection of Human Rights, UN doc.A/RES/32/127, 16 December 1977.

consider establish such regional machinery.⁹² Perspectives regarding regional arrangements then evolved further with the end of the Cold War. In his 1992 Report, *An Agenda for Peace*, the UN Secretary-General indicated that greater involvement of regional arrangements in international relations would not only lighten the burden on the UN, but also “contribute to a deeper sense of participation, consensus and democratization in international affairs”.⁹³ Burchill argues that the normative implications of the latter point is that, instead of an appeal to uniformity, there is an increasing willingness to allow diverse regional views and voices to be expressed and recognised.⁹⁴ The 2004 report of the UN Secretary-General’s High-Level Panel on Threats, Challenges and Change recognised the role played by regional bodies in a variety of activities including human rights, peace-keeping, and environmental protection. It also acknowledged that regional arrangements have “gone farther than the United Nations in setting normative standards” and are a “vital part of the multilateral system” that does not contradict the efforts of the UN.⁹⁵ This was soon followed by the Outcome Document of the 2005 UN World Summit, which supported a stronger relationship between the UN and regional organisations.⁹⁶ This included the expansion of consultation and cooperation through formalised agreements, as well as the strengthening of cooperation in the economic, social and cultural fields.⁹⁷

The discussion on how regional arrangements fit into the broader international system will be deepened in Chapter 3, particularly in the areas of collective security and human rights protection. However, it would suffice to say regionalism has increasingly been accepted not to contribute to fragmentation in the international system or a lowering of universal standards.⁹⁸ If regional arrangements are “part of the system as a whole, and not a separate system”,⁹⁹ it is then better to view

⁹² See UN General Assembly resolution 45/167, *Regional Arrangements for the Promotion and Protection of Human Rights*, UN doc.A/RES/45/167, 18 December 1990.

⁹³ UN Secretary-General, *An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peace-Keeping*, UN doc. A/47/277, 17 June 1992, at para. 64.

⁹⁴ Richard Burchill, “Regional Approaches to International Humanitarian Law”, *Victoria University of Wellington Law Review* 41 (2010):205-233, at 217. See also Karin Mickelson, “Rhetoric and Rage: Third World Voices in International Legal Discourse”, *Wisconsin International Law Journal* 16 (1998):353-419.

⁹⁵ *A More Secure World: Our Shared Responsibility - Report of the High-level Panel on Threats, Challenges and Change*, UN doc.A/59/565. 2 December 2004, at paras 94 and 272.

⁹⁶ *2005 World Summit Outcome*, UN doc. A/RES/60/1, 24 October 2005, at para.170.

⁹⁷ *Ibid.*

⁹⁸ The issue of the fragmentation of international law is discussed in Chapter 2.

⁹⁹ Jennings also notes that the quality of universality is then that it is “recognized as valid and applicable in all countries, whatever their cultural, economic, socio-political, or religious histories and

regionalisation of ICrimJ as a complementary way to ensure that universal goals continue to be upheld and ICL remains relevant in the diverse regions of the world.

1.2 An Alternative to International and National Solutions

The norms and practices of mainly Western liberal criminal law underpinning the current ICrimJ system however do not always achieve the twin, and sometimes conflicting, objectives of protecting and maintaining peace and security, as well as sanctioning and ultimately protecting peoples against atrocities.¹⁰⁰ Whilst holding the perpetrators of international crimes individually accountable may be universally accepted,¹⁰¹ the present modalities of prosecuting them at the national and international levels should therefore not be deemed as the only avenues to advance ICrimJ. To best serve the intended functions of ICL in each unique situation, it is indeed crucial to relate the substantive goals of ICrimJ with considerations regarding *where* this process occurs and *how* this condemnation is to be operationalised. The research thus next examines how well ICrimJ is being upheld at the international and national levels, and suggests how a regional approach may sometimes be superior. At this point, it is critical to reiterate that no argument is being made to replace international judicial institutions or reduce the role of courts in the concerned country.¹⁰² The ICC, *ad hoc* criminal tribunals, hybrid courts and national judicial institutions have their strengths and should remain within the toolkit of the ICrimJ system.¹⁰³ Allowing the territorial State to prosecute as many offenders for their crimes is undoubtedly not only practical, but probably also best in terms of helping

traditions”, but it “does not mean uniformity”. Robert Jennings, “Universal International Law in a Multicultural World”, in Maarten Bos and Ian Brownlie, eds., *Liber Amicorum for the Rt Hon Lord Wilberforce* (Oxford: Clarendon Press, 1987), at 41-42.

¹⁰⁰ Akhavan contends that the need for ICrimJ itself then “reflects the failure to prevent mass atrocities”. Akhavan, *supra* n.2, at 530.

¹⁰¹ A study of the conflict in the former Yugoslavia, for example, notes that “[a]cross national lines, the interview subjects voiced their belief in universal criminal accountability for perpetrators of war crimes”. Laurel Fletcher and Harvey Weinstein, “A World unto Itself? The Application of International Justice in the Former Yugoslavia”, in Eric Stover and Harvey Weinstein, eds., *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge: Cambridge University Press, 2004), at 45.

¹⁰² As existing institutions are completing their work, with the exception of the ICC, the era of internationalised criminal jurisdictions is over and focus is now on national capacity building. Morten Bergsmo, “Complementarity and the Challenges of Equality and Empowerment”, *FICHL Policy Brief Series* 8 (2011):1-4, at 1.

¹⁰³ Indeed, Cassese contends that international courts are the most appropriate forum for delivering impartial and unbiased justice for serious breaches of international law, particularly on behalf of the international community. Cassese, *supra* n.12, at 460.

both the nation and individual victims recover from atrocities.¹⁰⁴ A regional solution is thus merely envisioned as an additional alternative when impunity persists, lives and justice are threatened, or the conflict-riddled State does not have the adequate resources or infrastructure to deal with the individuals who are believed to bear the greatest responsibility for the egregious crimes.

1.2.1 Compared to Upholding ICrimJ at the International Level

A deontological rationale for prosecuting international crimes at the international level is that they are so evil that they affect all of mankind,¹⁰⁵ and every State would want (or at least be entitled) to condemn the individual for the atrocities committed.¹⁰⁶ A related practical explanation is then found at the establishment of the IMT after WWII: the Allies wanted to create a judicial body where they would collectively reserve the right to prosecute leading German political and military officials for atrocities that occurred in the territory of more than one State.¹⁰⁷

Alternatively, ensuring individual criminal responsibility established under ICL can be seen as a duty of States and the international community as a whole “to achieve justice for the victims through accountability of the offenders”.¹⁰⁸ International response is then further legitimised if the domestic legal system is incapacitated in the wake of mass atrocity, or is inherently too politicised and biased, illegitimate and unreliable, or corrupt. In other words, if the State concerned is either unable or unwilling to conduct a genuine investigation and prosecution, the international community has the legitimacy (and some argue the duty) to intervene on behalf of the victims. Goldstone thus argues that if the international community indeed cares for victims and their “rightful claims for justice”, international crimes

¹⁰⁴ Justice and the rule of law are thus posited to be best served by local criminal accountability. Jose Alvarez, “Crimes of States/Crimes of Hate: Lessons from Rwanda”, *Yale Journal of International Law* 24 (1999):365-484

¹⁰⁵ The Preamble of the ICC Statute thus opens with a reference to the “common bonds” and “shared heritage” of the international community that “may be shattered at any time”.

¹⁰⁶ As international crimes violate the very norms of humanity, the political and moral interests of the entire international community are then also served by punishing their perpetrators. Considered as being “committed against all of humankind”, Goldstone argues that the international character of these “atrocious crimes” thus dictates that all States have an interest in exercising jurisdiction over them. Goldstone, *supra* n.25, at 4.

¹⁰⁷ See the Statement of Atrocities adopted at the Moscow Conference was signed by US President Roosevelt, UK Prime Minister Churchill and Soviet Premier Stalin, at <http://avalon.law.yale.edu/wwii/moscow.asp>.

¹⁰⁸ Ratner, *supra* n.16, at 295.

should be credibly and efficiently investigated, and those found guilty to consequently be prosecuted and appropriately punished.¹⁰⁹

Under either justification, the delivery of ICrimJ at the international level is “legitimated by the assumed *moral right* to inflict retributive punishment”.¹¹⁰ However, the rationale for such authority of international courts is unclear beyond claims that “the selected punishment is a necessary response on the part of the civilised world”.¹¹¹ It is worth noting that by attributing atrocities that ‘shock the conscience of humanity’ to individual perpetrators, the international community is also downplaying its role in creating the underlying circumstances or failing to stop them from occurring.¹¹² In this regard, cynics claim the ICTY was a figleaf for the inaction by the major powers to stop the conflict in the former Yugoslavia,¹¹³ and argue that the tribunal was essentially a cost-effective alternative to military intervention.¹¹⁴ In Rwanda, despite having information about what was transpiring,¹¹⁵ the international community similarly failed to take action that could have prevented or reduced the magnitude of the genocide, and only established the ICTR to prosecute and punish individuals after the fact.¹¹⁶ Therefore, before the international community can truly claim the moral legitimacy to punish individuals for perpetrating egregious

¹⁰⁹ Goldstone, *supra* n.25, at 20.

¹¹⁰ Ralph Henham, “Philosophical Foundations of International Sentencing”, *Journal of International Criminal Justice* 1 (2003):64-85, at 74.

¹¹¹ *Ibid*, at 72.

¹¹² Such judicial reductionism “erases any involvement of the “civilised” world ... in the violations”. Mark Drumbl, “Collective Violence and Individual Punishment: The Criminality of Mass Atrocity”, *Northwestern University Law Review* 99 (2005): 539-610, at 588.

¹¹³ It is not certain that UNSC action would have been taken if the violations were not being perpetrated in Europe and shocked the conscience of many people in the Western democracies. As such, some Governments “felt compelled by public opinion to take action to stop the carnage”, but “were not prepared to commit to military action and settled for the establishment of the ICTY”. Goldstone, *supra* n.25, at 7.

¹¹⁴ That said, it should be acknowledged that there was a UN peacekeeping force, the UN Protection Force (UNPROFOR), on the ground in Croatia and in Bosnia and Herzegovina between February 1992 and March 1995.

¹¹⁵ Force Commander of the UN Assistance Mission for Rwanda (UNAMIR), Romeo Dallaire, had on 11 January 1994 notified the UN of major weapons caches and Hutu plans to murder the Tutsi population and Belgian UNAMIR soldiers. Despite requests before and during the genocide, authorisation for UNAMIR to intervene was refused. Malvern notes that “[c]onclusive proof that a genocide was taking place was provided to the Security Council in May and June while it was happening”. See Linda Melvern, *A People Betrayed: The Role of the West in Rwanda’s Genocide* (London: Zed Books, 2000), at 227.

¹¹⁶ It is however noted that the French government had launched Opération Turquoise in June 1994 to establish and maintain a “safe zone” in the south-west of Rwanda. Its objectives were to contribute to the security and protection of civilians and displaced persons in danger in Rwanda, but its effectiveness has been questioned.

international crimes, it may have to earn that right by first acting to stop the atrocities.¹¹⁷

In this regard, a more often evoked justification for dispensing justice and inflicting punishment at the international level is that egregious crimes affect broadly defined ‘international interests’, particularly peace and security.¹¹⁸ This may potentially be linked to the notion of collective security and the burgeoning notion of the Responsibility to Protect (RtoP),¹¹⁹ as well as post-war reconstruction and rehabilitation under *jus post bellum*.¹²⁰ Nevertheless, the histories of the ICTY and ICTR illustrate that getting third-party States sufficiently interested and achieving some global consensus to act are both inherent drawbacks of intervention at the international level.¹²¹ The failure to prevent or stop the atrocities that occurred in the former Yugoslavia and Rwanda was clearly not because the international community had no knowledge of the atrocities. Rather, the inaction was largely due to a lack of political will. As such, although failures to deal with conduct “very worthy of censure” under ICL may inadvertently provide some form of legitimacy for it,¹²² the eventual decision to act in the former Yugoslavia and Rwanda was primarily driven by increasing public awareness through media (especially television) reports about what was going on. It not only led to the embarrassment of governments for their failure to react earlier, but more importantly also to the domestic political risks of further inaction.¹²³ Even then, the collective response chosen by the international

¹¹⁷ Some scholars rightly contend that international trials and ICL should not serve as a cover for unwillingness to take more decisive action or as an excuse for not dealing with other more difficult and deep-seated problems. Cryer, *supra* n.12, at 37-38.

¹¹⁸ The preamble of the London Charter of 8 August 1945 declared that the Allies were acting “in the interests of all the United Nations”. See Quincy Wright, “The Law of the Nuremberg Trial”, *American Journal of International Law* 41 (1947):38-72, at 51.

¹¹⁹ See discussion in Chapter 3.

¹²⁰ Orend contends that it is important to consider the termination phase of war in Just War Theory, including the need for rules to end hostilities fairly, thereby facilitating a complete return to peace. Brian Orend, “Jus Post Bellum”, *Journal of Social Philosophy* 31 (2000):117-137. For a further discussion, see Richard DiMaggio, “The Evolution of the Just War Tradition: Defining Jus Post Bellum”, *Military Law Review* 186 (2005):116-163.

¹²¹ ICL is undoubtedly affected by international *realpolitik*. Discretion and selectivity ultimately mean that only a few sufficiently important but uncontroversial situations are examined. These limitations will similarly apply to the ICC, which has limited resources and is not immune to political influence because it depends largely on State funding. In terms of UNSC referrals to the ICC, Goldstone notes that the UNSC is “very much a political body”. It will not act under its peremptory Chapter VII powers only in cases where “it is considered by a permanent member to be inconsistent with its interests”. Goldstone, *supra* n.25, at 10.

¹²² Cryer, *supra* n.12, at 37.

¹²³ Schiff points that “domestic political concerns eventually drove states in the security council to establish the two tribunals”. Benjamin Schiff, *Building the International Criminal Court* (Cambridge: Cambridge University Press, 2008), at 44.

community – the innovative creation of the ICTY and ICTR under Chapter VII mandate – was extremely limited in its reach and “grudgingly undertaken” by the UNSC.¹²⁴ Scheffer highlights that the high operating costs of these two tribunals would eventually lead to “tribunal fatigue”, and they have since been tasked to finish their work by 31 December 2014.¹²⁵

Hence, it must be recognised that political imperatives and context will determine the degree of support and the kind of cooperation that States are prepared to give in the name of ICrimJ. These would include the nature and cultural setting of the conflict, whether it is still ongoing, and who is in power. Although the key determinants will vary between States, and most likely between regions, it will essentially be evaluated by self-interested States in terms of costs and benefits to themselves.¹²⁶ States that form the international community are thus unlikely to intervene in external conflicts (and sacrifice resources or possibly even lives) unless it is sufficiently in their interests.¹²⁷ Such justifications for prosecution and punishment on the international stage however diminish consideration for the actual victims of the crimes.¹²⁸ Moreover, it not only exacerbates the tension between the two goals of

¹²⁴ M Cherif Bassiouni, *The Statute of the International Criminal Court: A Documentary History* (Ardsey: Transnational Publishers, 1998), at 34.

¹²⁵ The tribunals are to transition their cases over to the International Residual Mechanism for Criminal Tribunals, which was created for financial and policy reasons, and in acknowledgement that national systems may be unable to handle the task. See David Scheffer, “Challenges Confronting International Justice Issues”, *US Department of State Dispatch* 9 (1998): 19-22; and Guido Acquaviva, “Was a Residual Mechanism for International Criminal Tribunals Really Necessary?”, *Journal of International Criminal Justice* 9 (2011): 789-96.

¹²⁶ States are generally more willing to undertake meaningful action on enforcement when “risks are reduced, public pressure and political will high, and other factors favourable”. Bruce Broomhall, *International Justice and the International Criminal Court –Between Sovereignty and the Rule of Law* (Oxford: Oxford University Press, 2003), at 153-154.

¹²⁷ Although the cost-benefit structure had changed significantly since the end of the Cold War, self-interested States continue to base their actions on calculations of the political, strategic, financial and economic costs and benefits to themselves. The Yugoslav civil wars of the early 1990s did not affect the vital interests of any of the powerful States, which sought more to avoid clashing with each. In Rwanda case, there was no also clear threat to international security or national interests of the major powers. Even under the ‘Responsibility to Protect’ doctrine, it is questioned whether States would bother to overcome the issue of state sovereignty, risk the lives of their own soldiers, and send an intervention force at its own cost to a far away country that has little value or importance to it. For a discussion, see Paul Williams and Michael Scharf, *Peace with Justice? War Crimes and Accountability in the Former Yugoslavia* (Lanham: Rowman and Littlefield, 2002); and Melvern, *supra* n.92.

¹²⁸ Findlay and Henham note that victim communities thus tend to reject the trial in favour of alternative local justice paradigms and less formal resolution processes. Indeed, Carsten and Daly highlight that those in East Timor and Rwanda (respectively) chose to empower and operate their own restorative mechanism. Findlay, *supra* n.26, at xi; Stahn Carsten, “Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor”, *American Journal of International Law* 95 (2001):952-966; and Erin Daly, “Between Punitive and Reconstructive Justice: the Gacaca Courts in Rwanda”, *New York University Journal of International Law and Politics* 34 (2002): 355-396.

ICrimJ, but also creates a critical disconnect between the delivery of justice and the affected communities.¹²⁹

It may therefore actually mean little to say that the sentences handed down by international courts are “made more onerous by its international stature, moral authority and impact upon world opinion”.¹³⁰ This argument is further weakened when, for example, compared to those prosecuted within Rwandan domestic courts, the detained leaders of the Rwandan genocide for example were afforded “refined judicial treatment” at the ICTR and could not be given the death penalty that had existed in Rwandan domestic law.¹³¹ Indeed, Drumbl finds that the punishment and stigma inflicted by international courts is often more modest than the punishment inflicted by many national courts (for the same international crimes that are codified within domestic law), which is particularly problematic because the former tend to assert jurisdiction over the leaders and planners of atrocity who are ostensibly more deserving of harsher punishment.¹³²

Compared to international initiatives, a regional approach may then sometimes be more acceptable to self-interested sovereign States and more capable of achieving the goals of ICrimJ for several reasons.¹³³ Firstly, regardless of whether egregious international crimes should be dealt with because their extreme evil affects all of humanity or that the international community has a duty to ensure justice for the victims, neighbouring regional States will clearly be more (directly and indirectly) affected and have interests more aligned with the victims than countries at the other end of the world.¹³⁴ A more substantial investment of political effort would be thus logically expected from regional member. Compared to an international solution,

¹²⁹ For example, many in Rwanda remain unaware of, or divorced from the work of the ICTR based in Arusha, Tanzania. The tribunal is only able to prosecute a few individuals and has a minimal effect on the lives of the survivors of the genocide. See Timothy Longman, Phuong Pham, and Harvey Weinstein, “Connecting justice to human experience: attitudes toward accountability and reconciliation in Rwanda”, in Stover, *supra* n.78; and Alison Des Forges and Timothy Longman, “Legal Responses to Genocide in Rwanda”, in Stover, *supra* n.78.

¹³⁰ *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Chamber, 10 Dec 1998), para.290.

¹³¹ Peter Uvin and Charles Mironko, “Western and Local Approaches to Justice in Rwanda”, *Global Governance* 9 (2003):219-231, at 220-221.

¹³² Domestic courts often sentence more harshly than international institutions (like death sentences), entail more onerous prison conditions, and offer less access to conditional release. Moreover, while the stigmatising value of punishment by international criminal tribunals is sometimes greater, there are other situations where there is no perception of enhanced stigma. Drumbl, *supra* n.33, at 15-16.

¹³³ The Habré case also shows that regional support for national trials may be a more effective form and complementary system of ICrimJ, compared to the complementarity embodied in a more remote ICC.

¹³⁴ The effects on neighbouring States range from the immediate spread of the conflict and the flow of refugees across national boundaries, to the longer-term economic impact on national economies due to the regional instability. In terms of aligned interests, besides the shared goal of preserving regional peace and security, there may also be ethnic (and even family) ties that bind adjacent countries together.

setting priorities on which crimes to investigate would also be considerably easier for one that is regionally based.¹³⁵ In addition, the financial cost of regional enforcement would be substantially lower – in part due to the physical proximity to any alleged international crime.

Secondly, if the concerned State is either unwilling or unable to stop or tackle an egregious international crime that threatens (more possibly regional) peace and stability, legitimacy and incentives for action are arguably greater at the regional level than at the international level, given the direct and stronger effects suffered by neighbouring States.¹³⁶ Governments will likely also be less reluctant to devote resources to a regional situation, including the additional option of regional peace support operations.¹³⁷ Thirdly, given that it has more to lose from inaction and is thus more likely to intervene earlier, a regional community stands a better chance at subsequently claiming the moral high-ground to punish individuals for their crimes.¹³⁸

Fourthly, regions are less able to simply pin all the blame for atrocities on various individuals because the closely intertwined States are probably affected by the same myriad of political, social, cultural and economic issues. Increasingly interconnected neighbouring countries would have to address the underlying problems, at the very least, to prevent the harmful effects from recurring and spilling

¹³⁵ This may simply be due to the fact that it is easier to reach an agreement between fewer States (as opposed to achieving international consensus), and that regional mechanisms would only have to consider crimes within their geographic mandate (instead of all the situations across the whole world).

¹³⁶ As internecine conflicts and gross human rights violations affect regional security and stability, Africa has been working to ensure long-lasting peace by rebuilding societies after conflict and mass atrocity. The AU has begun to develop a peace and security architecture by building institutional mechanisms “aimed at preventing, managing and resolving crises and conflicts”. See Admore Kambudzi, ‘The International Criminal Court and Africa: The AU and the ICC’, in Max du Plessis and Antoinette Louw, eds., *The Investigation and Prosecution of ‘Core International Crimes’ and the Role of the International Criminal Court in Africa*, (Pretoria: Institute for Security Studies, 2007).

¹³⁷ For example, an African Standby Force has been created under the Peace and Security Protocol to intervene in a Member State in “grave circumstances or at the request of a Member State in order to restore peace and security”. Regarding the Darfur crisis, the African States have shown considerable commitment to finding a peaceful resolution, and the AU collaborated with the UN to deploy thousands of peacekeepers in the first hybrid peace operation to Sudan pursuant to UNSC Resolution 1769 (2007). See Kristiana Powell, “The African Union’s Emerging Peace and Security Regime: Opportunities and Challenges for Delivering on the Responsibility to Protect”, *ISS Monograph* 119 (May 2005); Article 13(3)(c) of the AU Protocol Relating to the Establishment of the Peace and Security Council; and UNSC resolution 1769 of 31 July 2007, UN Doc. S/RES/1769 (2007).

¹³⁸ In this regard, while pressing for a comprehensive peace agreement in the Sudan, the AU has maintained that international crimes should not be met with impunity – based on its right to intervene in a Member State “in respect of grave circumstances, namely war crimes, genocide and crimes against humanity”. See Article 4(h) of the Constitutive Act of the African Union; and Article 7(1)(e) of the AU Protocol Relating to the Establishment of the Peace and Security Council.

over their borders.¹³⁹ Lastly, a regional approach may then be better able to balance the twin goals of ICrimJ. This is due not only to the fact that neighbouring States can better understand and prioritise the needs of the situation, but also because the approach will be more politically attuned and culturally sensitive to the needs both sets of victims. An externalised solution will not provide regional strategic and security considerations, or local standards and values, as great a chance at being reflected in the process to hold accountable perpetrators of international crimes.¹⁴⁰

By providing a geographic nexus to the crimes being investigated, regionalising ICrimJ thus addresses some concerns regarding selectivity and bias that has been argued to exist at the international level,¹⁴¹ and also deals with the problem of disconnect from the situation and the victims. Most importantly, a regional approach may be more effective at securing the cooperation of the affected State.¹⁴² Not only does it reduce concerns of exposure to external (particularly Western liberal) political influences and lessen the sovereignty costs for the State,¹⁴³ regional pressures from neighbouring countries to comply are less likely to be ignored.¹⁴⁴ Other regional States are then also less likely to harbour suspects, provide safe passage or refuse to

¹³⁹ A regional solution may thus possibly veer towards something like a Truth and Reconciliation Commission (TRC) rather than formal criminal prosecutions and sanctions. See discussion on the appropriate form(s) for a regional mechanism in Chapter 4.

¹⁴⁰ While ICC-style criminal justice has “great promise”, such an approach will not work in every situation given the problems faced by post-conflict States. Jalloh highlights that some governments “may legitimately need policy room to fashion solutions to ensure accountability in line with local realities, preferences, cultures and traditional justice mechanisms”. Charles Jalloh, “Regionalizing International Criminal Law?”, *International Criminal Law Review* 9 (2009): 445-499, at 472.

¹⁴¹ This is illustrated by African protests that the ICC has turned into an institution primarily focused on their region, which are strengthened by claims of double standards and US ‘exceptionalism’. The reality of global politics and the selectivity of international criminal law means that it is unlikely that the US, Russia or China would be referred to the ICC by UNSC. Hence, Schabas notes that many developing States perceive this as “a cynical exercise authority by great powers”. See UNSC resolution 1422 of 12 July 2002, UN Doc. *S/RES/1422*, and UNSC resolution 1593 of 31 Mar 2005, UN Doc. *S/RES/1593*; Carsten Stahn, “The Ambiguities of Security Council Resolution 1422”, *European Journal of International Law* 14 (2003):85-104; Roberto Lavalle, “A Vicious Storm in a Teacup: The Action by the United Nations Security Council to Narrow the Jurisdiction of the International Criminal Court”, *Criminal Law Forum* 14 (2003):195-220; and William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010), at 333.

¹⁴² While hybrid tribunals have the potential to reduce the disconnect between the situation and victims, there is no guarantee that the concerned State will cooperate. See further discussion in this chapter.

¹⁴³ It is noteworthy that Western intervention in the humanitarian crisis in Libya was only realistic after support for UN-backed military action against Libya was given by the Arab League. The US had stressed that Arab support was required after regional countries warned against ‘foreign intervention’.

¹⁴⁴ The efficacy of regional pressure is illustrated by the ASEAN effort to persuade Myanmar, after it refused international relief assistance after the Cyclone Nargis natural disaster. Only after ASEAN’s pressure did Myanmar agree to open its borders to the regional and then international community.

bring them to justice.¹⁴⁵ These all implicitly bolster good governance and further the rule of law in the region. There is also the potential of further reducing possible conflicts between foreign and local interests if regional peacekeepers are deployed to intervene and restore regional peace and stability. Moreover, these troops could also be held accountable by the same regional mechanism for any egregious international crimes they may commit,¹⁴⁶ thereby avoiding possible criticisms of one-sided and selective justice.¹⁴⁷ In this regard, if it can be located within an existing regional mechanism, a regional approach may also be able to generate an even greater level of public acceptance and legitimacy on the ground.

1.2.2 Compared to Upholding ICrimJ at the National Level

The attention of ICrimJ at the international level is typically directed at individuals who are believed to bear the greatest responsibility, such as the masterminds, architects and leaders behind the atrocities. A practical reason behind this is that international judicial institutions have limited financial and human resources and are only able to prosecute a small fraction of international crimes.¹⁴⁸ As such, national courts are often envisaged or identified as the primary forum for prosecuting individuals for violations of international law by both international treaties and

¹⁴⁵ The success of any approach turns on the cooperation of both the concerned State and its regional neighbours. However, it will be particularly important for criminal trials, where the apprehension of suspects, the location and protection of witnesses, as well as access to and preservation of evidence are critical. A lack of cooperation on the ground proved to be a major hindrance for both the ICTY and ICTR, as political leaders in States where suspects and evidence were to be found sometimes opposed the work of the tribunals, protected suspects and withheld information and evidence.

¹⁴⁶ The revelations in 2004 of sexual exploitation and abuse by a number of UN peacekeepers in the Democratic Republic of the Congo highlighted that peacekeeping personnel can also be responsible for abhorrent acts. This led to the Zeid Report, which could be used by regional mechanisms. See *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations*, UN Doc. A/59/710.

¹⁴⁷ A clear lesson from the ICTY, which could not investigate accusations that NATO personnel committed war crimes during the air war to drive Serbian forces out of Kosovo, is that a unified and non-selective application of the law is needed to avoid any perceptions of bias. Cryer, *supra* n.12, at 37.

¹⁴⁸ For example, the ICC requested for a 2014 Budget of €126.07m, an increase of €10.95m from the previous year, to fund a rise in staff costs, expected increases in victims and witness protection, and efforts to improve the capacity of the Office of the Prosecutor (OTP). However, the ICC Committee on Budget and Finance has recommended that the figure be reduced to €121.57m, and the OTP maintain the average cost of ongoing cases to €1.31m each. See *Report of the Committee on Budget and Finance on the work of its twenty-first session*, ICC-ASP/12/15, 4 November 2013.

customary law.¹⁴⁹ The task of holding the majority of (lower-level) offenders accountable in fact falls largely upon domestic legal systems.

The underlying philosophical justifications for States to act are largely the same as those for an international response: their peace, security and other interests may have been affected; and they have a duty to ensure accountability and provide the victims with a sense of justice and closure. That said, the practical and moral stakes are much higher for the State concerned, as failure to address the atrocities leaves the wounds of the nation open to fester, and the responsibility to their citizens (victims and otherwise) are more concrete and immediate. Within the territorial State, national enforcement of ICL is therefore often preferred as justice is felt to be closer and more relevant to the victims, and also because it will leave a stronger lasting impact on the wider community seeking reconciliation.¹⁵⁰ Furthermore, the availability of witnesses and access to evidence are less likely to pose a problem, and national prosecutions are more efficient and less expensive to conduct compared to international ones.¹⁵¹

In many instances, there may also be international legal obligations for States to deal with perpetrators of international crimes.¹⁵² Domestic courts may then commence proceedings if the conduct has been criminalised under domestic law and a jurisdictional basis exists for them to do so.¹⁵³ Besides the primary claim of territoriality, other bases for jurisdiction include the nationality principle, protective principle, and passive personality principle. The argument also exists that States can claim jurisdiction over core international crimes under the universality principle, as they are considered part of customary international law and entail various obligations

¹⁴⁹ It has become clear that the ICC will only be able to prosecute a small fraction of international crimes due to resource and practical constraints. If States are to bear most of the burden in ensuring accountability, the lack of an obligation for national prosecution is then inconsistent with an effective system of complementarity. See Payam Akhavan, "Whither National Courts? The Rome Statute's Missing Half - Towards an Express and Enforceable Obligation for the National Repression of International Crimes", *Journal of International Criminal Justice* 8 (2010): 1245-1266.

¹⁵⁰ National enforcement of ICL usually entails traditional criminal prosecution and punishment, but it is noted that in some cases in various jurisdictions other less formalised methods of accountability and less punitive measures may be preferred. See discussion in Chapter 4.

¹⁵¹ There are however several reasons why domestic prosecutions may not occur including, *inter alia*, amnesties and the need to (at least temporarily) share power. See Stef Vandeginste and Chandra Lekha Sriram, "Power Sharing and Transitional Justice: A Clash of Paradigms?", *Global Governance* 17 (2011):489-505; and discussions of transitional justice issues below and in Chapter 4.

¹⁵² For example, various international conventions contain provisions regarding individual accountability for prohibited acts, which may oblige States to criminalise the conduct under domestic law, prosecute or extradite suspects to a State party willing to do so, or some combination of these.

¹⁵³ The jurisdiction of national courts to adjudicate acts of another sovereign is however limited by domestic and international law rules on sovereign immunity and related doctrines.

for States to perform.¹⁵⁴ These duties under ICL and customary international law are however quite limited and disjointed, and do not actually form a coherent criminal code for States to enforce. Moreover, third-party States (without a territorial or nationality connection to the offenses or offender) have seldom prosecuted such offenses and most are generally reluctant to exercise even limited degree of jurisdiction.¹⁵⁵ Some unwillingness is due to the hesitation to prosecute offenses purely under universal jurisdiction or customary international law.¹⁵⁶ However, States have usually chosen not to prosecute an individual or groups of offenders because of the additional financial costs of such an endeavour, the lack of (surplus) resources within their judicial systems, or geopolitical considerations.¹⁵⁷ The fact is that the underlying tension remains between the twin normative goals of ICrimJ and the self-interests of States. While the complementarity principle of the Rome Statute has provided indirect incentives for domestic enforcement of ICL,¹⁵⁸ the ICC currently cannot even compel its own State Parties to act, especially when it is against their own national interest.¹⁵⁹ The Rome Statute in fact does not even impose a direct duty for a State to prohibit the crimes under the Statute or oblige them to extradite or prosecute

¹⁵⁴ Few third-party States however have effective universal jurisdiction legislation and the political will to use it. Foreign criminal jurisdictions are also unlikely to be able to prosecute many cases. Bergsmo, *supra* n.79, at 2.

¹⁵⁵ Countries like Belgium and Spain had been notable exceptions. However, Belgium repealed its domestic “law of universal jurisdiction” in August 2003, and introduced a new legislation on extraterritorial jurisdiction similar to or more restrictive than that of most other European countries. Spain similarly amended its domestic laws in March 2014 to limit the use of universal jurisdiction.

¹⁵⁶ The prosecution of high-level perpetrators of core international crimes by States under universal jurisdiction is further complicated by the ICJ decision in the Arrest Warrant Case that “jurisdiction does not imply absence of immunity”. The Court held that Belgium failed to respect the immunity from criminal jurisdiction and the inviolability which the serving Foreign Minister of the Democratic People's Republic of the Congo enjoyed under international law. That said, the Court stated four circumstances when such immunities do not represent a bar to criminal proceedings, including before the ICC. See Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment of 14 February 2002, at paras.59-61.

¹⁵⁷ Action may then have to be taken at the international level, such as by the ICC through a referral of the situation from the UNSC, like in the cases of Sudan and Libya.

¹⁵⁸ This is particularly true under the proposals for positive complementarity, where the ICC will cooperate with States and, under appropriate circumstances, promote and assist international criminal proceedings in domestic courts. For a discussion, see William Burke-White, “Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice”, *Harvard International Law Journal* 49 (2008): 53-108; and Olympia Bekou, and Annika Jones, “Complementarity After Kampala: Capacity Building and the ICC’s Legal Tools”, *Goettingen Journal of International Law* (2010):791-811, at pp.802-803.

¹⁵⁹ The complementarity principle highlights that States have yet to renounce the sovereign model of international law, and “demonstrates the subsidiarity of the ICC vis-a-vis domestic criminal jurisdictions. Delmas-Marty, *supra* n.3, at 554.

suspects.¹⁶⁰ As such, the ICrimJ system is still caught in a Westphalian web where the goodwill and cooperation of sovereign States is paramount.

If regular enforcement of ICL is allowed to remain primarily in State hands, the most critical and worrisome situation for ICrimJ occurs when core international crimes are perpetrated on behalf of or with the complicity of the State itself. Except for cases (but not all) where the former regime associated with the abuses has been overthrown, domestic institutions are unlikely to take serious action against agents of their own State in times both of war and peace, let alone political leaders and other high ranking government officials.¹⁶¹ For example, the token trials conducted after the First World War (WWI) by the Supreme Court of the German Reich (*Reichsgericht*) were tainted by the absence of will and bias of the judges in favour of their fellow Germans.¹⁶² The *Reichsgericht* only tried and convicted a few cases,¹⁶³ for which most scholars believe that the sentences were too lenient for the crimes committed.¹⁶⁴ Moreover, most of those convicted subsequently received pardons within a few years. After WWI, Turkey similarly failed to prosecute its own citizens for suspected war crimes, including those linked with the Armenian massacres.¹⁶⁵

During the Cold War, when ICrimJ had to be focused on “more effective means of inter-State cooperation in the national prosecutions of crimes”,¹⁶⁶ there were also hardly any prosecutions by governments of their own agents accused of breaching ICL (such as the Genocide and Geneva Conventions). This was not because such violations did not occur. Rather, allegations of core international crimes would generally have been labeled and dismissed as propaganda attacks during this period.

¹⁶⁰ While Part 9 of the ICC Statute lists the various forms of cooperation that the Court can request of State Parties, the ICC cannot directly compel such cooperation and must rely on the Assembly of States or the UNSC. See Article 87(7), ICC Statute.

¹⁶¹ Due to the unavoidable bias resulting from the involvement of a State in a conflict, the President of the International Committee of the Red Cross (ICRC), Gustave Moynier, argued that a neutral judicial body would, in theory at least, offer a better chance of impartiality than the judiciary of the concerned State(s). See Christopher Hall, “The First Proposal for a Permanent International Criminal Court”, *International Review of the Red Cross* 322 (1998): 57-74.

¹⁶² For details, see Claud Mullins, *The Leipzig Trials: An Account of the War Criminals' Trials and a Study of German Mentality* (London: H.F. & G. Witherby, 1921).

¹⁶³ According to the American Historical Association, only twelve Germans (out of 1744 investigative cases initiated) were eventually tried at Leipzig. Six were convicted and six were acquitted. Two of the convicted defendants were later acquitted in a retrial.

¹⁶⁴ For example, see Claus Kress, “Versailles–Nuremberg–the Hague: Germany and International Criminal Law”, *International Lawyer* 40 (2006):15-40, at 18-20.

¹⁶⁵ In late 1921, the Turks even convinced the British to release the 67 suspects who had been deported and held in Malta by the latter. For details, see William Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge: Cambridge University Press, 2000).

¹⁶⁶ This included treaties on extradition and prosecution, as well as mutual legal assistance. Cryer, *supra* n.12, at 145.

As a result, conflicts (mostly civil and proxy wars) and atrocities flared up around the world – often with the knowledge, consent, or even collusion of either superpower.¹⁶⁷ Given this atmosphere of superpower rivalry and obstructionism, Werle noted that “a lack of political will prevented the use of penal sanctions against state-sponsored atrocities”.¹⁶⁸ One exception was the US military court martial relating to the My Lai massacres. Even then, of the 26 men initially charged, only Second Lieutenant William Calley was eventually convicted of the murder of unarmed Vietnamese civilians. This event not only highlighted again the limitations of domestic prosecutions, but also the intervening and negating effects of national politics on ICrimJ.¹⁶⁹

On the other hand, Broomhall notes that States then are most willing to enforce ICL when it is in its own interests, such as “where prior regimes, ‘rogue’ or disfavoured elements of government, scapegoats, or non-State actors are under investigation”.¹⁷⁰ At this other end of the spectrum, domestic institutions are typically the preferred forum amongst States to prosecute such cases.¹⁷¹ But impunity for international crimes is not the concern. Instead, real and fair ICrimJ may be incapable of being dispensed by the State because national accountability mechanisms may be

¹⁶⁷ Hence, the “real tragedy” of the halt in progress, particularly the failure to create an international forum for ICrimJ, was that there existed no deterrence against or ability to prosecute the acts of genocide and crimes against humanity that occurred during the Cold War period. Eric Leonard, *The Onset of Global Governance: International Relations and the International Criminal Court* (Hampshire: Ashgate, 2005), at 28-29.

¹⁶⁸ Gerhard Werle, *Principles of International Criminal Law*, 2nd ed. (The Hague: TMC Asser Press, 2009), at 3.

¹⁶⁹ On 31 March 1971, Calley was sentenced to life imprisonment and hard labor at Fort Leavenworth. One day later, US President Richard Nixon had him transferred from Leavenworth prison to house arrest at Fort Benning pending his appeal. On 20 August 1971, Calley's sentence was then reduced to 20 years, and in 1974 President Nixon issued Calley a limited Presidential Pardon. For details, see Joseph Goldstein, Burke Marshall and Jack Schwartz, *The My Lai Massacre and Its Cover-up: Beyond the Reach of Law?* (New York: Free Press, 1976).

¹⁷⁰ Broomhall, *supra* n.103, at 162.

¹⁷¹ While some governments (Uganda, Democratic Republic of the Congo and Central African Republic) have referred their situations to the ICC, the preference for local trials is most recently seen in Libya. After the Gaddafi regime fell, the National Transitional Council clearly wanted domestic trials despite any credible legal infrastructure in Libya and arrest warrants being issued by the ICC.

manipulated, arbitrarily used, and abused as legitimised tools for political reprisals and vendettas.¹⁷²

That said, it is equally important to recognise that the pursuit of accountability may instead be a comparatively low priority for a transitional State¹⁷³ trying to reconcile and rebuild itself after a national tragedy.¹⁷⁴ It may even be intentionally limited because of the risk that it may cause societal instability or break the fragile peace that had been negotiated with the promise of amnesties.¹⁷⁵ Separately, a post-conflict State may also be unable to hold perpetrators of core international crimes accountable because it does not have the required financial and human capital, and its domestic administrative, legal and judicial infrastructure have been destroyed by war.¹⁷⁶ Any demands placed on such national institutions, especially in the context of mass atrocities, would easily outstrip available resources and not result in the proper administration of ICrimJ.¹⁷⁷

In sum, attempting to hold individuals accountable through politicised and inadequate domestic mechanisms can clearly only have a negative and detrimental effect on ICrimJ. To prevent impunity, efforts at the national level must be both fair

¹⁷² For example, the Iraqi Special Tribunal that prosecuted former President Saddam Hussein and his aides (for war crimes, crimes against humanity and genocide) has been viewed to be a kangaroo court. However, that may be only slight better than the denial of any trial at all because of ‘accidental killing’ or execution after capture by the new regime. For example, it was revealed that former Libyan strongman Muammar Gaddafi was beaten, abused and killed after his capture by Libya’s NTC forces on 20 October 2011. His eldest son, Saif al-Islam, was said to be desperately trying to avoid the fate of his father and in indirect contact with the ICC over a possible surrender. He has since been captured in Libya and is now facing trial within the country, despite the ICC’s finding that Libya cannot give him a fair trial and request for him to be handed over to the Court.

¹⁷³ The need to confront transitional justice issues, like sustaining peace in the post-conflict phase, national security and reconstruction, as well as societal reintegration and reconciliation is further discussed in Chapter 4. See also Carsten Stahn and Jann Kleffner, eds., *Jus Post Bellum: Towards a Law of Transition From Conflict to Peace* (The Hague: TMC Asser, 2008); and Anne-Marie La Rosa and Xavier Philippe, “Transitional Justice”, in Vincent Chetail, ed., *Post Conflict Peacebuilding: A Lexicon*, (Oxford: Oxford University Press, 2009).

¹⁷⁴ Due to the scale and mass involvement associated with egregious international crimes, prosecuting every offender may also be impractical and unrealistic.

¹⁷⁵ Given the need to consider the desires of the victim communities and the circumstances that allow for peace to exist, criminal prosecution may not be always the solution and local restorative mechanisms should also be considered. See Diane Orentlicher, “Settling accounts: the duty to prosecute human rights violations of a prior regime”, *Yale Law Journal* 100 (1991):2537-2618.

¹⁷⁶ Existing weaknesses in the justice sector of materially less resourceful States could be further aggravated by a conflict. A classic example of such a situation is Rwanda after the 1994 genocide, where it is estimated that there were 10 lawyers left in the country after the massacres, and court buildings had been pillaged and badly damaged. See Eugenia Zorbas, “Reconciliation in Post-Genocide Rwanda”, *African Journal of Legal Studies* 1 (2004):29-52, at p.34-35.

¹⁷⁷ There may be a *jus post bellum* duty for other States to help reconstruct post-conflict countries, particularly those that witnessed genocide. However, due to concerns about sovereignty and confidentiality, Bergsmo notes that actors in affected States will be “understandably reluctant” to openly discuss their capacity weaknesses and needs with foreign actors. Gary Bass, “Jus Post Bellum”, *Philosophy & Public Affairs* 32 (2004): 384-412, at 398-399; and Bergsmo, *supra* n.79, at 4.

and effective. However, it is highly possible that domestic systems in States afflicted by core international crimes will have biases regarding the guilt or innocence of an individual, and the chance of impartial and proper proceedings may be low at both ends of the spectrum. Even if these challenges can be managed, post-conflict societies may then lack the necessary infrastructure and properly trained personnel to pursue accountability under ICL, let alone the possibility that piercing the veil of impunity may be low on the national agenda compared to ensuring peace and reconciliation.

The intervention of other States presents an option for upholding ICrimJ, but their responses are likely to be determined by political and other extra-legal considerations. Unless there is a strong basis for seeking jurisdiction, most third-party States will find situations in a faraway part of the world too onerous and costly to justify involvement.¹⁷⁸ Conversely, the ability of a single neighbouring State to intervene is then likely to be curtailed by criticisms of political motivations by both the forum and other regional countries. Furthermore, the legitimacy of unilateral action may be challenged because the adjacent State will be viewed as having a selfish strategic interest and thus not accepted as an ‘honest broker’ in the matter. This perception is heightened in the case of regional hegemons and immediate neighbouring States.

Compared to leaving ICrimJ solely in the hands of States, a regional approach may in some situations not only be more effective and efficient at preventing impunity, but also more acceptable to neighbouring countries – particularly if the atrocities have been perpetrated by the State or when national accountability mechanisms may be abused for intimidation and revenge. As Moynier had pointed out nearly 140 years ago, due to the unavoidable bias resulting from the involvement of a State in a conflict, decisions regarding guilt or innocence should be taken out of the hands of the criminal courts of the countries involved.¹⁷⁹ In this regard, a neutral regional institution will offer a better chance of impartiality than the domestic options available in the concerned State(s). Furthermore, regional political pressure could be used to isolate and force the hand of the reluctant State(s), as well as ensure that neighbouring States apprehend and prosecute or extradite suspects that have fled

¹⁷⁸ This may be due simply to the fact that a State is unlikely to choose to spend its limited (financial and other) resources on an issue that has minimal bearing on its national interests or little significance to its citizenry.

¹⁷⁹ See Gustave Moynier, “Note sur la création d’une institution judiciaire internationale propre à prévenir et à réprimer les infractions à la Convention de Genève”, translated and reprinted in Hall, *supra* n.138, at Annex.

across the border into their territory. Joint collective action by all the regional countries then curtails criticisms by acting as a check-and-balance against self-interested political motivations, and increases the legitimacy and credibility of the initiative and its outcomes.¹⁸⁰ Last but not least, the onerous and costly exercise can be shared amongst the various regional neighbours, and would be amply justified by the maintenance of regional peace and economic stability.

1.2.3 Internationalised or Hybrid Tribunals

Given the problems faced at both the international and national levels, the option of hybrid tribunals¹⁸¹ has also been explored by the international community in conjunction with national governments in East Timor, Sierra Leone and Cambodia.¹⁸² Although *ad hoc* international tribunals like the ICTY and ICTR would be less at risk of political interference, domestic bias and corruption, they are criticised for being too removed from both the affected countries and victims to achieve transitional justice and effect long-term social change.¹⁸³ The shift towards “internationalised domestic tribunals” like the Special Panels for Serious Crimes (SPSC) of East Timor, Special Court for Sierra Leone (SCSL), and Extraordinary Chambers in the Courts of Cambodia (ECCC) also highlight the fact that it is expensive¹⁸⁴ and not possible for all courts to be established in second or third countries.¹⁸⁵

¹⁸⁰ The strength, practicality and responsiveness of regional action is illustrated by ASEAN efforts to resolve the armed conflict in the disputed Thai-Cambodia border area, surrounding Preah Vihear temple, a protected UN World Heritage site. As a reassurance to each other, ASEAN and the international community, both countries invited Indonesia (then Chair of ASEAN) to send 15 observers to respective sides of the border area.

¹⁸¹ For a general discussion on hybrid tribunals, see Alberto Costi, “Hybrid Tribunals as a Viable Transnational Justice Mechanism to Combat Impunity in Post-conflict Situations”, *New Zealand Universities Law Review* 22 (2006): 213-239; Cesare Romano, André Nollkaemper and Jenn Kleffner, eds., *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford: Oxford University Press, 2004); and Laura Dickinson, “The Promise of Hybrid Courts”, *American Journal of International Law* 97 (2003): 295-310.

¹⁸² Hybrid tribunals may represent attempts by transitional states to reassert national sovereignty and avoid their nationals being tried in international courts. Steven Roper and Lilian Barria, *Designing Criminal Tribunals: Sovereignty and International Concerns in the Protection of Human Rights* (London: Ashgate, 2006), at 29.

¹⁸³ *Ibid.* See also Ellen Stensrud, *New Dilemmas in Transitional Justice: Lessons from the Mixed Courts in Sierra Leone and Cambodia*, *Journal of Peace Research* 46 (2009): 5-15, at 6-7.

¹⁸⁴ This move towards hybrid tribunals funded by voluntary contributions was supported by UN member states due to the concern over the escalating costs of funding the ICTY and ICTR from the UN budget. Köchler, *supra* n.72, at 132.

¹⁸⁵ For a discussion on these tribunals, see Alison Ryan, “The Special Panels for Serious Crimes of Timor Leste: Lesson for the Region”, in Neil Boister and Alberto Costi, eds., *Regionalising International Criminal Law in the Pacific* (Wellington: New Zealand Association for Comparative Law, 2006); and Suzannah Linton, “Cambodia, East Timor, Sierra Leone: Experiments in International Justice”, *Criminal Law Forum* 12 (2001): 185-246.

The SPSC in East Timor was the first internationalised tribunal in Southeast Asia.¹⁸⁶ However, it only managed to try and punish the “small fish” for the violence committed in 1999,¹⁸⁷ and was unable to prosecute many of those who bore the greatest responsibility for the serious violations of human rights because they were located in Indonesia.¹⁸⁸ Moreover, while the hybrid model was supposed to have promoted local relevance by being located within the national system, the tribunal failed to engage and connect with the locals.¹⁸⁹

The ECCC was then the first hybrid court located within an AMS and therefore of greater relevance to this discussion. Although the atrocities committed in Cambodia during the Pol Pot era are well known and documented, efforts to bring to justice senior Khmer Rouge leaders were stifled for nearly 30 years due to both internal and external factors.¹⁹⁰ With the arrest of Pol Pot in June 1997, interest in creating a criminal tribunal with jurisdiction to prosecute him and other surviving leaders rose rapidly,¹⁹¹ including amongst the international community.¹⁹² Nevertheless, it still took another decade before the ECCC was finally operational in 2007.¹⁹³

Commonly known as the Cambodia Tribunal, the ECCC is an example of a hybrid internationalised domestic tribunal set up by a national judicial system in collaboration with the UN to try egregious international crimes.¹⁹⁴ It is essentially a

¹⁸⁶ Within Asia, there is also the International Crimes Tribunal in Bangladesh established in 2009 to investigate and try individuals for genocide committed during the Bangladesh Liberation War in 1971.

¹⁸⁷ See Report of the Secretary-General on Justice and Reconciliation for Timor-Leste, UN Doc. S/2006/580, 26 July 2006.

¹⁸⁸ Over 300 indicted individuals remained out of the reach of the SPSC, and Ryan notes that prosecutions are unlikely in the foreseeable future because the governments of Indonesia and East Timor have “chosen to promote good relations rather than seek justice”. Ryan, *supra* n.162, at 97.

¹⁸⁹ The domination of international personnel and lack of outreach possibly played a role in the lack of interest by the East Timorese in the activity of the SPSC. *Ibid*, at 115.

¹⁹⁰ For a discussion on these factors, see Ryan Park, “Proving Genocidal Intent: International Precedent and ECCC Case 002”, *Rutgers Law Review* 63 (2010): 129-191, at 147; and John Ciorciari, “History & Politics Behind the Khmer Rouge Trials”, in John Ciorciari and Anne Heindel, eds., *On Trial: The Khmer Rouge Accountability Process* (Phnom Penh: Documentation Centre of Cambodia, 2009), at 33.

¹⁹¹ David Scheffer, “The Extraordinary Chambers in the Courts of Cambodia”, in M Cherif Bassiouni, ed., *International Criminal Law*, 3rd ed. (Martinus Nijhoff Publishers, 2008).

¹⁹² For parts of the international legal community, establishing the ECCC was part of the wider process of institutionalising the norms of ICrimJ. McCargo notes that other international stakeholders were also partly motivated by their guilty conscience for allowing the atrocities to be committed by the Khmer Rouge and for the lack of response thereafter. Duncan McCargo, “Politics by other means? The virtual trials of the Khmer Rouge tribunal”, *International Affairs* 87 (2011): 613–627, at 616 and 620.

¹⁹³ See Joint Statement by Judicial Officers, “ECCC Plenary Session Unanimously Adopts Internal Rules”, 13 June 2007.

¹⁹⁴ The Cambodia government and the UN reached an agreement in June 2003 on how the international community would assist and participate in the creation of the Extraordinary Chambers within the Cambodian court system. See Introduction to the ECCC.

national Cambodian court that employs a unique approach of mirroring international investigating judges, prosecutors, defence lawyers and judges with Cambodian counterparts.¹⁹⁵ The ECCC has a statutory mandate to prosecute senior leaders of Democratic Kampuchea and those who were most responsible for international crimes and serious violations of Cambodian law from 17 April 1975 to 6 January 1976.¹⁹⁶ It has the power to prosecute several offences under the 1956 Cambodian Penal Code, namely homicide, torture or religious persecution (Art.3), as well as international crimes like genocide (Art.4), crimes against humanity (Art.5), grave breaches of the Geneva Conventions of 12 August 1949 (Art.6), destruction of cultural property during armed conflict (Art.7), and crimes against internationally protected persons (Art.8). The Court heard its first case in 2009, with the trial of former interrogation centre chief Kaing Guek Eav (alias Duch).¹⁹⁷

Cayley points out that the ECCC is not only the first hybrid court to use a primarily civil law framework,¹⁹⁸ but also the first internationalised court to seat a majority of judges from the affected nation.¹⁹⁹ It is clearly a product of political agendas and compromises,²⁰⁰ which some believing that the UN had conceded too much in the name of “politics and expediency”.²⁰¹ Although the UN Group of Experts had recommended an *ad hoc* international criminal tribunal for Cambodia as the Cambodian judiciary was “unlikely to meet minimal international standards of

¹⁹⁵ For a general discussion, see Jörg Menzel, “Justice delayed or too late for justice? The Khmer Rouge Tribunal and the Cambodian “genocide” 1975-79”, *Journal of Genocide Research* 9 (2007): 215-233.

¹⁹⁶ See Art. 2 of the Law on the Establishment of the Extraordinary Chambers as amended, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).

¹⁹⁷ Duch was the sole defendant in Case 001, which was completed in 2010 with a conviction and sentence of 35 years (reduced to 19 years after taking into account previous detention). For ongoing Case 002, four individuals were charged, but one has since been found unfit to stand trial (Ieng Thirith), while another passed away on 14 March 2013 (Ieng Sary).

¹⁹⁸ Andrew Cayley, “Prosecuting Mass Atrocities at the Extraordinary Chambers in the Courts of Cambodia (ECCC)”, *Washington University Global Studies Law Review* 11 (2012): 445-458, at 445.

¹⁹⁹ Cambodian judges form the majority in all three ECCC chambers - namely, pre-trial, trial and appeal. For a discussion, see Hanna Betelman, “International Standards and National Ownership? Judicial Independence in Hybrid Courts: The Extraordinary Chambers in the Courts of Cambodia”, *Nordic Journal of International Law* 79 (2010): 341-382; and Sylvia de Bertonado, “Problems arising from the mixed composition and structure of the Cambodian extraordinary chambers”, *Journal of International Criminal Justice* 4 (2006): 285-293.

²⁰⁰ The long history of the negotiations leading to the creations of the ECCC clearly demonstrated the compromises made. Seeta Scully, “Judging the Successes and Failures of the Extraordinary Chambers of the Courts of Cambodia”, *Asian-Pacific Law & Policy Journal* 13 (2011): 300-353, at 321. For details on the discussions between Cambodia and the UN, see Daniel Donovan, “Joint UN-Cambodia Efforts to Establish a Khmer Rouge Tribunal”, *Harvard International Law Journal* 44 (2003): 551-576.

²⁰¹ Helen Horsington, *The Cambodian Khmer Rouge Tribunal: The Promise of a Hybrid Tribunal*, *Melbourne Journal of International Law* 5 (2004): 462-482, at 478.

justice”,²⁰² Cambodian Foreign Minister Hor Nam Hong unequivocally rejected such suggestions and indicated that Khmer Rouge leaders would be tried by Cambodian courts.²⁰³ McCargo argues that the Cambodian government viewed it as another opportunity to manipulate international aid donors and evade political conditionalities,²⁰⁴ as well as validate its own power and authority.²⁰⁵ Chigas similarly contends that the Cambodian government supported the establishment of a national court in order to secure international legitimacy and funding.²⁰⁶ In this regard, the objectives of the Cambodian government and international actors for the creation of the ECCC are divergent,²⁰⁷ with the former subsequently focused on limiting the number of individuals put on trial and ensuring control over the judgments. Not only has an adversarial dynamic been introduced at every level of the court through the pairing of local and foreign staff, but the majority of the judges in each chamber are also Cambodian.²⁰⁸ With a supermajority vote requiring the support of four out of five judges in the pre-trial or trial chamber, Cambodian judges can effectively prevent any undesirable decisions.

Despite its institutional apparatus and applicable law consisting of “a blend of the international and the domestic”,²⁰⁹ as well as the fact that it is the subject of an international agreement between Cambodia and the UN,²¹⁰ the ECCC essentially operates like a domestic court with procedures that are “in accordance with

²⁰² See *Identical letters dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council*, 53rd Sess., Agenda Item 110(b), UN Doc No. A/53/850 and S/1999/231.

²⁰³ See Elizabeth Becker, “Cambodia Spurns UN Plan for Khmer Rouge Tribunal”, *New York Times*, 13 March 1999, at <http://www.nytimes.com/1999/03/13/world/cambodia-spurns-un-plan-for-khmer-rouge-tribunal.html>

²⁰⁴ It is noteworthy that the Cambodian government agreed to ratify the ICC Statute in April 2002, as it was in the midst of seeking international support and funding to establish the ECCC.

²⁰⁵ McCargo elaborates that prosecuting ageing Khmer Rouge leaders proffers the Cambodian government with convenient domestic scapegoats for the country’s problems, and entrench its standing and power base by showing the ability to determine the nature and direction of the Court. McCargo, *supra* n.169, at 616-617.

²⁰⁶ George Chigas, “The politics of defining justice after the Cambodian genocide”, *Journal of Genocide Research* 2 (2000): 245-265, at 257.

²⁰⁷ This mirrors the political contests between the international community and the governments in Rwanda and the former Yugoslavia. See Victor Peskin, *International justice in Rwanda and the former Yugoslavia: virtual trials and the struggle for state cooperation* (Cambridge: Cambridge University Press, 2008).

²⁰⁸ This outcome was keenly opposed by the UN but insisted by Cambodia. Scheffer, *supra* n.168.

²⁰⁹ Dickinson, *supra* n.158, at 295.

²¹⁰ See *Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea*, 6 June 2003, at www.eccc.gov.kh/english/cabinet/agreement/5/Agreement_between_UN_and_RGC.pdf

Cambodian law”.²¹¹ Hence, Shahabuddeen contends that the court is domestic, and not an internationalised judicial instrument, as it does not take its character from controlling participation of the international community in its formation.²¹² Criticisms of the ‘hybrid’ ECCC that have emerged are thus much like those against prosecuting international crimes at the national level, including political interference, bias and corruption, as well as inability to ensure standards of fairness and adequate protection of international human rights.²¹³ As a corollary, the court also faces the challenges of limited capacity and resources, including difficulties in obtaining and sustaining sufficient funding.²¹⁴ For political reasons, the Cambodian government may however not object if the voluntary contributions funding the ECCC operations now ceased as it would bring the trials to an end.²¹⁵

Regarding concerns over political interference and the ECCC’s lack of judicial independence,²¹⁶ Scully opines that they have proven to be legitimate by the controversy arising over future trials after Case 002.²¹⁷ Three international ECCC judges have since resigned, with co-investigating judge Siegfried Blunk citing attempted government interference in the court’s proceedings and reserve co-investigating judge Laurent Kasper-Ansermet stating that he was prevented from

²¹¹ See Art.12(1) of the *Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea*, 6 June 2003.

²¹² Mohamed Shahabuddeen, “Teething Phase of the ECCC”, *Chinese Journal of International Law* 10 (2011): 469-502, at 470. Robertson similarly questioned if the ECCC could be deemed an ‘international court’. Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice*, 3rd ed. (Harmondsworth: Penguin, 2006), at 327.

²¹³ For example, see Rupert Skilbeck, “Defending the Khmer Rouge”, *International Criminal Law Review* 8 (2008): 423-445, at 434.

²¹⁴ The UN General Assembly had directed that the ECCC be funded by voluntary contributions from the international community, and Lambourne argues that this arrangement delayed the commencement of the ECCC trials. Sperfeldt notes that signs of donor fatigue have since also begun to appear, leading to challenges for continued operations. See Wendy Lambourne, “The Khmer Rouge Tribunal: Justice for Genocide in Cambodia?”, presented at 25th Annual Conference of the Law and Society Association Australia and New Zealand (LSAANZ, 2008); and Christopher Sperfeldt, “From the Margins of Internationalized Criminal Justice: Lessons Learned at the Extraordinary Chambers in the Courts of Cambodia”, *Journal of International Criminal Justice* 11 (2013): 1111-1137, at 1114-1115.

²¹⁵ McCargo argues that the Cambodian government would have successfully thwarted the international community if the tribunal was unable to proceed beyond Case 002. McCargo, *supra* n.169, at 618.

²¹⁶ Cambodian PM Hun Sen reportedly told the UN Secretary-General that cases 003 and 004 “will not be allowed”, while the Minister of Information stated that “[i]f they want to go into Case 003 and 004, they should just pack their bags and leave”. The Cambodian Foreign Minister also commented that the arrest of more Khmer Rouge leaders “is a Cambodian issue” and “must be decided by Cambodia”. See ECCC Press Release, Statement by the International Co-Investigating Judge, 10 October 2011.

²¹⁷ Scully notes that Cambodian ECCC staff acquiesced at every stage of the process to the Cambodian government’s wish that no further trials take place, including the refusal by Cambodian Co-Prosecutor Chea Leang to sign Introductory Submissions placing new suspects before the Investigating Judges and the position of Cambodian PTC judges to not allow investigations to continue. See Scully, *supra* n.177, at 325-327.

properly and freely carrying out his duties.²¹⁸ In this vein, there have also been allegations of bias²¹⁹ and corruption²²⁰. The ECCC is clearly not the perfect model of a court to investigate and prosecute senior Khmer Rouge leaders for atrocities committed during the Pol Pot era.²²¹ Designed as a compromise to protect Cambodian sovereignty and ensure international support, it has now been recognised to epitomise “all the worst features” of a hybrid court,²²² including possibly not meeting international fair trial standards.

Although the Court has arguably met with success in some areas,²²³ it is uncertain that it is improving the situation or attitudes towards ICrimJ in Cambodia,²²⁴ let alone the wider ASEAN region. This is illustrated by the divergence between local expectations of the ECCC and international notions of justice, rights and fairness.²²⁵ Even if it does eventually create a lasting change in Cambodian society, some scholars have stressed that the ECCC still “may not necessarily be the best model for future *ad hoc* or hybrid court structures”.²²⁶ While they are recognised as occupying the same space being discussed – between the international and national, hybrid and internationalised courts are further noted to typically be not only *ad hoc* but more importantly also *post hoc*.²²⁷ Besides criticism that they are not meeting the *post hoc*

²¹⁸ The third judge to resign was Supreme Court Chamber Judge Motoo Noguchi. See UN News Centre, “Judge Resigns from UN-backed Cambodia Genocide Tribunal”, 16 May 2012, at <http://www.un.org/apps/news/story.asp?Cr1=&NewsID=42020&Cr=cambodia#.UqACSWthiKO>

²¹⁹ As Cambodian judges operate in a patronage-based and highly politicised domestic court system, McCargo contends that they are extremely vulnerable to political pressures. McCargo, *supra* n.169, at 625.

²²⁰ There have even been claims that Cambodian ECCC officials and judges were required to pay up to 30 percent of their salaries to government officials to secure their appointments. See Cat Barton, “Kickback claims stain the KRT”, *Phnom Penh Post*, 23 February 2007; and Kathleen Claussen, “Up to the Bar? Designing the Hybrid Khmer Rouge Tribunal in Cambodia”, *Yale Journal of International Law* 33 (2008): 253-273, at 256.

²²¹ See Scheffer, *supra* n.168.

²²² McCargo, *supra* n.169, at 621.

²²³ See Scully, *supra* n.177, at 349; and Sperfeldt, *supra* n.191.

²²⁴ Harris notes that the imposition of foreign systems and universal norms of justice may be seen by some Cambodians “as an expression of contempt for their own traditions”. Ian Harris, “‘Onslaught on Beings’: A Theravada Buddhist Perspective on Accountability for Crimes Committed in the Democratic Kampuchea Period”, in Jaya Ramji and Beth Van Schaack, eds., *Bringing the Khmer Rouge to Justice: Prosecuting Mass Violence Before the Cambodian Courts* (New York: Edwin Mellen Press, 2005), at 80.

²²⁵ Given that most Cambodians primarily saw the ECCC as a place of punishment, McCargo notes that an outcome that would appear positive for most international observers of the Duch trial was widely considered too lenient and objectionable within Cambodia. McCargo, *supra* n.169, at 624.

²²⁶ Brianne McGonigle, “Two for the Price of One: Attempts by the Extraordinary Chambers in the Courts of Cambodia to Combine Retributive and Restorative Justice Principles”, *Leiden Journal of International Law*, 22 (2009):127–149, at 146.

²²⁷ The ECCC and ICT in Bangladesh are notably prosecuting crimes committed more than three decades ago.

expectations placed on them,²²⁸ these judicial bodies are unable to de-escalate or halt the perpetration of international crimes, let alone prevent them with enforceable legal action.²²⁹ Moreover, they are not expected to be permanent fixtures with long-term plans and objectives.²³⁰ The UN Secretary-General in fact stated “it is essential that, from the moment any future international or hybrid tribunal is established, consideration be given, as a priority, to the ultimate exit strategy and intended legacy in the country concerned”.²³¹

In sum, the shortcomings of hybrid and internationalised tribunals are clear from the experiences of the both SPSC in East Timor and the ECCC in Cambodia. Moreover, such institutions will not have longer term presence and goals. As opposed to temporary hybrid tribunals that may not leave a legacy beyond a narrow prosecutorial function, the research proposes instead to establish a permanent regional mechanism that can focus on more than just *post-hoc* justice, and include elements of avoidance, prevention and deterrence.

1.2.4 Advantages and Disadvantages of Regional Solutions

Regional solutions to uphold ICL may however not necessarily be preferred by States. Considerations include the presence (or absence) of distinctive regional norms or credible mechanisms for dealing with international crimes. At this point, it is crucial to highlight the assumption that States are rational actors and will make strategic assessments about where and how to respond to breaches of ICL. The decisions will inevitably reflect each State’s political agenda, the incentives and disincentives posed by action and inaction, as well as its relative power positions.²³² Hence, it would be imprudent to insist that one (international, regional, or domestic) approach to ICrimJ is always superior to another, especially since they all have relative strengths and

²²⁸ Mendez concludes that hybrid tribunals are “not easy solutions to implement”, and enthusiasm for it must be tempered given the shortcomings of past and present hybrid tribunals. Parinaz Mendez, “The New Wave of Hybrid Tribunals: A Sophisticated Approach to Enforcing International Humanitarian Law or an Idealistic Solution with Empty Promises?”, *Criminal Law Forum* 20 (2009): 59-95, at 94-95.

²²⁹ The popularity of hybrid tribunals as an avenue for transnational criminal justice has then “declined dramatically”. Pdraig McAuliffe, “Hybrid Tribunals at Ten: How International Justice’s Golden Child Became an Orphan”, *Journal of International Law and International Relations* 7 (2011): 1-65, at 1.

²³⁰ A defining feature of a hybrid tribunal is its temporary or transitional nature. Williams, *supra* n.70, at 1145.

²³¹ See The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report by the Secretary-General, UN Doc. S/2004/616, 23 August 2004, at para.46.

²³² The relative domestic and regional strength of the coalition of States will also affect the nature of the regional security order. Solingen, *supra* n.6, at 3.

weaknesses. For any regionalisation of ICrimJ to succeed, States must ultimately find that the benefits of regional action outweigh the costs of regional inaction. In this connection, both the benefits and liabilities of regionalising ICrimJ that were previously highlighted in relation to international, domestic and hybrid approaches to ICrimJ are then summarised for ease of reference. This list will be useful in identifying the considerations operating within each unique regional situation, and assessing how viable is the regionalisation of ICrimJ.

Several generic advantages of a regional approach exist. Firstly, regional States are unlikely to avoid inaction as their national interests are inevitably impacted by a problem in their backyard. Adjacent countries may be more seriously and immediately affected by regional disorders, and thus more incentivised to get involved. Given that regional arrangements will also have a continuing presence in the region, apathy is an unlikely outcome. Scholars note that regional arrangements help ensure a lasting commitment to the issues and problems facing the region,²³³ as well as a degree of consistency and continuity in dealing with matters of regional importance.²³⁴ Separately, while it is easy to be appalled by atrocities committed in both war and peace, it may be realistically harder for faraway unaffected States to commit to resolving the problem. Relatedly, as regional bodies have a more limited sphere of responsibility and do not have to account for all issues around the world like an international organisation, issues and problems in the region are less likely to be marginalised.²³⁵ Secondly, it will be more practical and less (financially and logistically) onerous to prosecute a crime and enforce a sentence closer to the locus than in a distant location. The relatively smaller geographical area covered by a regional body not only facilitates an easier determination of jurisdiction, but also makes possible the more efficient allocation of resources and delegation of operational responsibilities.²³⁶ The proximity of regional arrangements to the perpetration of an international crime also ensures a quicker response, as well as a more cost-efficient

²³³ Hilaire McCoubrey and Justin Morris, *Regional Peacekeeping in the post-Cold War Era* (The Hague: Kluwer Law International, 2000), at 212 and 224.

²³⁴ Burchill notes that although the UN has protracted presence in many conflict areas, competing priorities along with financial costs mean that any presence is not necessarily permanent, Bassiouni similarly highlights that the disjuncture between the varying UN institutional bodies and personnel involved is a problematic issue. Burchill, *supra* n.94, at 211; and M Cherif Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Court", *Harvard Human Rights Journal* 10 (1997):11-62, at 12.

²³⁵ See MacFarlane, *supra* n.76, at 281-2.

²³⁶ For example, see L Ronald Scheman, "The OAS and the Quest for International Co-operation: American Vision or Mirage" *Case Western Journal of International Law* 13 (1981): 83-105, at 101.

system and lower costs. For example, it reduces the cost of and distance travelled by legal teams and witnesses for investigations, collecting evidence, and the conduct of trials. Successful deterrence, efficient response and effective rehabilitation efforts will further involve, or benefit from, regional cooperation and a larger pool of resources. Indeed, Burchill notes that through the pooling of resources, a regional arrangement will be well placed to assist national jurisdictions in the prosecution of international crimes, providing support and expertise that may not be available at the domestic level.²³⁷ The focus on regional solutions as opposed to domestic initiatives is therefore based not only on the possible inability or unwillingness of a State to take action, but also the recognition that international crimes often have cross-border implications. Thirdly, common strategic interests coupled with some degree of regional homogeneity typically generates greater consensus compared to international efforts, particularly in sensitive areas of international law that may create international legal obligations and undermine State sovereignty.²³⁸ For example, regional arrangements within the European Union for the protection of human rights have not only achieved higher levels of agreement than at the universal level, but also created more effective enforcement mechanisms.²³⁹ It is expected that socio-economic, political, and cultural commonalities among regional States make enforcement of ICL easier, due to increased collaborative experiences and reduced political objections preventing action.²⁴⁰ Indeed, the various regional developments on human rights all reflected a desire among groups of States to develop human rights instruments applicable to their particular circumstances, and were a direct response to the inability to reach consensus at the global level. Regional arrangements also allow for assertions of communal identity within the international system,²⁴¹ whereby existing institutionalised

²³⁷ Burchill, *supra* n.94, at 222.

²³⁸ See Richard Burchill, "Regional Arrangements and the UN Legal Order", in Nigel White and Richard Collins, eds., *International Organisations and the Idea of Autonomy* (London: Routledge, 2010).

²³⁹ For an overview of the positive benefits of regional integration in the European Union, see Walter van Gerven, *The European Union: A Polity of States and Peoples* (Oxford: Hart Publishing, 2005); and Koenraad Lenaerts and Piet van Nuffel, *Constitutional Law of the European Union*, 3rd ed. (London: Sweet & Maxwell, 2011).

²⁴⁰ See generally Howard Levie, "Some Constitutional Aspects of Selected Regional Organizations: A Comparative Study", *Columbia Journal of Transnational Law* 5 (1966):14-67; and Ellen Frey-Wouters, "The Prospect for Regionalism in World Affairs", in Cyril Black and Richard Falk, eds., *The Future of the International Legal Order: Trends and Patterns* (Princeton: Princeton University Press, 1969).

²⁴¹ See Yasuaki Onuma, "A Transcivilizational Perspective on Global Legal Order in the TwentyFirst Century: A Way to Overcome Westcentric and Judiciarycentric Deficits in International Legal Thoughts", in Ronald St John Macdonald and Douglas Johnston, eds., *Towards World*

mechanisms of cooperation may be co-opted and their resources used as member States believe they have direct interests in resolving a shared problem.

Fourthly, regional initiatives allow States to approach and address the problem according to local practices and conditions.²⁴² In this regard, a key reason for the establishment of the Caribbean Court of Justice was to “[e]mpower regional jurists to give effect to regional standards and values as the laws of the region are interpreted and applied”.²⁴³ There is also no need to appease a global coalition or be bound to precedents from other regions. As a result, such efforts may generate greater legitimacy amongst the local populations. Scholars note that geographic proximity and a common experience provide regional arrangements with a deeper understanding of regional considerations and priorities.²⁴⁴ Compared to universal arrangements that may be viewed as external interference or the imposition of inappropriate foreign solutions, regional bodies therefore enjoy a higher degree of legitimacy and cooperation among regional countries. A key element of realising ICrimJ is indeed winning the support of the leaders and people on the ground, who have an inherent suspicion of foreign intervention. The concern expressed by the AU that the ICC is only prosecuting cases from Africa is a case in point.²⁴⁵ Hence, ‘African’ or ‘Asian’ solutions to regional conflicts may be requested and preferred over international ones, especially if they directly affect or undermine sensitive issues like State sovereignty and jurisdiction. For example, ASEAN’s active involvement in the conflict between Vietnam and Cambodia illustrates both the interest of neighbouring States and the utility of regional awareness.²⁴⁶

Constitutionalism: Issues in the Legal Ordering of the World Community (Leiden: Martinus Nijhoff, 2005).

²⁴² For a discussion on the importance of understanding and incorporating localised cultural views, see Jessica Almqvist “The Impact of Cultural Diversity on International Criminal Proceedings”, *Journal of International Criminal Justice* 4(2006):745-764.

²⁴³ See Remarks of Sir Denys Byron CJ, quoted in Derek O'Brien, “The Caribbean Court of Justice and Reading Down the Independence Constitutions of the Commonwealth Caribbean: The Empire Strikes Back”, *European Human Rights Law Review* 10(2005):607-627, at 608.

²⁴⁴ A.H. Robertson and J G Merrills, *Human Rights in the World*, 3rd ed. (Manchester: Manchester University Press, 1992), at 223-224.

²⁴⁵ While the ICC has been designed to distance itself from political manipulation, Bassiouni points out that the Court inherently functions in a political environment. Bassiouni, *supra* n.234, at 13.

²⁴⁶ See Khong Yuen Foong and Helen Nesadurai, “Hanging together, institutional design, and cooperation in Southeast Asia: AFTA and ARF”, in Amitav Acharya and Alastair Johnston, eds., *Crafting Cooperation: Regional International Institutions in Comparative Perspective* (Cambridge: Cambridge University Press, 2007). 32 at 4244. In the context of human rights, see J Donnelly “International Human Rights: A Regime Analysis” (1986) 40 Int'l Org 599 at 637.

Fifthly, limiting involvement to regional States reduces the reach of foreign powers and addresses the fear of neo-colonialist threats.²⁴⁷ In this regard, Schreuer argues that there will be a resurgence of group solidarity among regional States as a result of the desire to deal with problems locally and within a smaller group that better facilitates cooperation.²⁴⁸ Furthermore, regional mechanisms allow the ball to be put in the hands of smaller States, whose voices are often drowned out in the decision making processes at the global level.

Sixthly, it may be easier to secure the support (or at least acquiescence) of other neighbouring countries. Regional governments and people will be more inclined to follow the directive of a regional system as it is seen to possess a better understanding of the problem, as well as the local situation and considerations.²⁴⁹ Most likely also members of the relevant regional grouping, a greater level of compliance can also be compelled among these third-party States as they will certainly participate in the decision making process and have the opportunity to incorporate their views.²⁵⁰ While it is not impossible that they will not cooperate, under these circumstances, third-party States will be more inclined to support than sabotage regional initiatives. Although 'free-riding' and other collective-action problems may occur,²⁵¹ a regional approach has more potential for effective collective action because there will be fewer actors at the regional level. As a corollary, each contribution is more valuable essential and any free-riding is more easily and immediately detected.

Regional approaches are however not perfect or without shortcomings, and there are several generic disadvantages of regionalism. Firstly, although regional homogeneity has some benefits for collective action, any inter-States rivalries and political cleavages can obviate that advantage. Intra-regional animosities should never be overlooked as they can prevent consensus and halt any planned efforts.²⁵²

²⁴⁷ MacFarlane *supra* n.76, at 283.

²⁴⁸ Christoph Schreuer, "Regionalism v. Universalism", *European Journal of International Law* 6(1995):477-499, at 479.

²⁴⁹ A.H. Robertson and J G Merrills, *Human Rights in the World*, 3rd ed. (Manchester: Manchester University Press, 1992), at 223-224.

²⁵⁰ James Rosenau, "Governance in the Twenty-first Century", *Global Governance* 1 (1995): 13-43, at 16.

²⁵¹ This likelihood is increased by the presence of a regional hegemon or another State that benefits disproportionately from the action and will provide much of the public good anyway.

²⁵² Various scholars point out that geographic proximity may be a source of conflict and deep-seated antagonism between regional States. See Schreuer, *supra* n.248, at 479; and MacFarlane, *supra* n.76, at 283-5.

Separately, if a regional hegemon exist, it may seek to advance its own agenda or even place itself above the law.²⁵³ This is illustrated by the actions of the US in the context of the Organization of American States (OAS).²⁵⁴ On the other hand, if there is no dominant State, regional initiatives may not be able to identify or agree on a country to lead.

Secondly, regional homogeneity best addresses externalised threats and may be less relevant in situations deemed as internal or sovereign of neighbouring States. While State sovereignty is more permeable now, most countries are still reluctant to compromise the principle and intervene in the domestic affairs of another State. Hence, the likelihood of regional States (or organisations) taking action against the political or military leader(s) of a neighbouring countries may be low. Upholding ICL may require regional States to view ICrimJ as more important than traditional political considerations and alliances. However, the reality is that political leaders will be reluctant to either aid or take action against another regional government in an internal conflict. That said, if regional States have jointly established a mechanism to deal with international crimes, it would be equally hard for the regional organisation to allow impunity to prevail without suffering international criticism.²⁵⁵

Thirdly, regional institutions may also be prevented from taking any action that may compromise the sovereignty of a member State, or be caught in between two or more conflicting members. Alternatively, regional bodies may be unable to be unbiased if a powerful State attempts to impose its will on the decision making process. A key requirement for successfully achieving ICrimJ is that both perpetrators and victims of egregious international crimes perceive the arbiters as neutral. Regional initiatives may have difficulty being considered as impartial as international solutions.

Fourthly, regional groupings may not have the mandate to tackle ICrimJ issues and enforce ICL, let alone have the necessary infrastructure and processes in place. Most regional organisations are not established to perform such tasks, nor designed to undertake prosecutorial, judicial or penal functions. As such, they will probably lack not only the experience, but also the appropriate rules, procedures, and organisational

²⁵³ Regional bodies will not only act if it is in the geopolitical and material interests of the regional hegemon, but will also serve to legitimise such interventions. Jon Pevehouse, *Democracy from Above: Regional Organisations and Democratisation* (New York: Cambridge University Press, 2005), at 132.

²⁵⁴ See Tom Farer, *The Grand Strategy of the United States in Latin America* (New Jersey: Transaction, 1988).

²⁵⁵ For example, it would be difficult for the AU to overlook an international crime perpetrated by a member State given that its Constitutive Act rejects impunity as one of the principles of the organisation. See Constitutive Act of the African Union, Art4(o).

structure to effectively do the job.

Last but not least, this problem may be compounded by a lack of human capital, knowledge, material resources and funds.²⁵⁶ Ill-equipped to constructively and effectively contribute to regional goals, some regional institutions may be prevented from achieving their stated objectives.²⁵⁷ The aid of an international organisation possessing the requisite range of knowledge and capabilities may then be required to perform the tasks that the regional body is unable to do.²⁵⁸ Hence, the resolve and willingness of regional States to pursue ICrimJ is clearly only part of the equation. For a credible deterrence to exist, proposed regional solutions must also possess the ability and means to enforce ICL. Critical for the prospects for regionalising ICrimJ are thus the capabilities, or lack thereof, of the countries and institutions involved. Although a regional approach may be cheaper than an international solution, there will also be fewer contributing States to share the burden. Unless it comprises of developed and wealthy members, a small organisation may find the costs too onerous.

Regional solutions may therefore not always be effective, let alone superior to international or domestic alternatives. The issue of whether ICrimJ is best served at the regional level must then be considered against the advantages and disadvantages presented to States in their specific milieu.²⁵⁹

1.3 Conclusion

It is acknowledged that regional initiatives are not perfect and no panacea for the political and practical difficulties of pursuing ICrimJ. Although increasingly availed upon for the maintenance of peace and security, there are disadvantages and disincentives to regional efforts, particularly when: a regional hegemon is involved; there are few commitments to regional norms; the political risks and financial costs are high; and the burden of action is only shared by a few States. In this regard, a regional solution is envisaged as an additional alternative to solutions at the national and international levels. It may be more aligned to the political calculations of self-

²⁵⁶ Schreuer, *supra* n.248, at 479.

²⁵⁷ See for example Charles Chauvel, "Regionalism in the Pacific: Legal Implications for Regionalism", in Kennedy Graham, ed., *Models of Regional Governance for the Pacific: Sovereignty and the Future Architecture of Regionalism* (Christchurch: Canterbury University Press, 2008), at 10.

²⁵⁸ Ronald Yalem. "Regionalism and World Order", *International Affairs* 38 (1962):460-471, at 468-9.

²⁵⁹ For discussion, see Antonio Cassese, "Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction", *Journal of Criminal Justice* 1 (2003):589-595.

interested States and better able to balance the twin aims of ICrimJ according to the unique needs of each situation. Such an approach will not only promote accountability and the rule of law, but will also serve State interests. As a corollary, regional initiatives may achieve greater legitimacy, support and compliance from the concerned State(s) as well as immediate neighbours.²⁶⁰ Regional mechanisms may serve a further preventative function as an effective monitor and honest broker between the conflicting groups. The efficacy of a regional solution however depends a lot on the region in question, the type of international crime(s) committed, the approach employed, and the capabilities of the States (or regional associations) undertaking such efforts. The suitability and best way to regionalise ICrimJ in Southeast Asia is then examined in detail in subsequent chapters.

²⁶⁰ Prosecutions of international crimes encounter greater domestic resistance the further they are held from the *locus delicti*, partly due to allegations of bias and misunderstandings about their goals. A regional approach may thus address this problem, as well as concerns about both making justice inaccessible to the victims and the distant incarceration of offenders. Cryer, *supra* n.12, at 36. For a discussion on the issue of local participation and ownership, see also Ngaire Woods, "Good Governance in International Organisations," *Global Governance* 5 (1999):39-61, at 43.

CHAPTER 2

THE GROWING ALLURE OF REGIONAL ALTERNATIVES

As noted in Chapter 1, while often obscured by ostensibly straightforward statements of support by States, ICrimJ comprises inherent political dimensions and considerations that greatly limit both the manner in which ICL is allowed to develop and the extent that it is transformed into State practice.¹ This is illustrated by the political machinations by States that influenced the very purpose and viability of the criminal tribunals established after WWI.² Most notable was the application of double standards, like limiting criminal prosecution to officials of defeated States and exempting the behaviour of the victors from legal scrutiny. The dominance of State considerations in ICrimJ was again evident after WWII. Although the Allies eventually decided to conduct judicial proceedings,³ it is evident that considerable subjectivity and political selectivity had been injected into the International Military Tribunal (IMT) at Nuremberg and the International Military Tribunal for the Far East (IMTFE) at Tokyo.⁴ While they have since been confirmed as part of international

¹ As international law seeks to constrain sovereign States, it is often upheld “at the sufferance of states, subject to their desires, dependent upon their generosity. Benjamin Schiff, *Building the International Criminal Court* (Cambridge: Cambridge University Press, 2008), at 1.

² Indeed, the issue of responsibility “was not predicated on the pursuit of international criminal accountability or the pursuit of international justice”. Then-US Secretary of State Robert Lansing believed that there was no violation of existing international law and “the Europeans’ plan to place the Kaiser on trial was nothing more than an exercise in political pandering”. M. Cherif Bassiouni, “World War I: The War to End All Wars and the Birth of a Handicapped International Criminal Justice System”, *Denver Journal of International Law and Policy* 30 (2002):244-291, at 250, 256 and 271.

³ With the Nazi surrender, the Allies had two choices: (1) executive action without judicial proceedings; or (2) some form of judicial proceedings. Appleman noted that the intention of the Allies in holding the proceedings were: “(1) To punish military and civilian leaders for waging aggressive war and thereby to retard war mongering and to increase the possibilities for a permanent peace; (2) To punish persons responsible for the commission of war crimes; (3) To crystallize certain laws of humanity and thereby to deter the repetition of genocide and other oppressions of minority groups and aliens”. See Howard Ball, *Prosecuting War Crimes and Genocide: The Twentieth-Century Experience* (Lawrence: University of Kansas Press, 1999), at 44-49; and John Appleman, *Military Tribunals and International Crimes* (Westport: Greenwood Press, 1971), at v.

⁴ The idea an international tribunal consisting of neutral nationals was propounded during the period by legal scholars like Hyde and Kelsen. Cassese contends that it was rejected “clearly for political reasons; that is, because the victors wished to be and remain in control of the trials”. Köchler similarly argues that the creation of a court where the Allies reserved the right to try German political and military officials made obvious the political context in which the trials were located. See Charles Hyde, “Punishment of War Criminals”, *Proceedings of the American Society of International Law* 37 (1943): 39-46; Hans Kelsen, *Peace Through Law* (Chapel Hill: University of North Carolina Press, 1944), at 111-116; Antonio Cassese, *International Criminal Law*, 3rd ed. (Oxford: Oxford University Press, 2012), at 31; Hans Köchler, *Global Justice or Global Revenge? - International Criminal Justice at the Crossroads* (Verlag Wien: Springer, 2003), at 66; and Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford: Oxford University Press, 2008).

law,⁵ the Nuremberg Principles were therefore essentially based on rules devised by the States to try individuals from the losing side. During the Cold War, the tensions between the two superpowers and its spill-over effects then made it politically unfeasible and practically impossible to advance ICL beyond the national level.⁶

Given that States clearly had and continue to have a large influence on how ICrimJ is framed and ICL is allowed to operate, a regional approach must appeal to and serve the needs of these self-interested sovereign entities. In this connection, the first section of this chapter briefly looks at the continuously evolving system of ICrimJ to rationalise why regional approaches have been overlooked during the twentieth century. It will assess the extent that States have shaped the modern ICrimJ system and its substantive crimes, and thereby avoided the establishment of an international judicial organ during much of that period. An underlying question is then whether a need existed for States to consider the regionalisation of ICrimJ as a response to the threat of a global institution with the jurisdiction to prosecute their citizens, in particular political leaders and high-ranking government officials.

The second section examines if the situation has changed with the dawn of the twenty-first century and the creation of a permanent international criminal court. The allure of regional alternative for ICrimJ mechanism will be considered against the backdrop of two contrasting issues: (1) the fundamental tension between the sovereignty of States and universal accountability for international crimes;⁷ and (2) the crusade over more than a century to create a permanent international criminal court. With the successful establishment of the ICC, does the development of ICL remain within the control of States? Or has the absolute sovereignty over the

⁵ Gerhard Werle, *Principles of International Criminal Law*, 2nd ed. (The Hague: TMC Asser Press, 2009), at 11.

⁶ National systems and domestic courts were however only marginally better at upholding ICrimJ and enforcing ICL (like the Genocide and Geneva Conventions). For example, although several countries passed domestic legislation to prosecute suspected Nazi war criminals, not all national proceedings were successful. In Canada, Imre Finta was charged under the *Criminal Code*, R.S.C. 1927, but was later acquitted. The Canadian government subsequently ended its prosecutorial policy. In Australia, the War Crimes Amendment Act was passed in 1988, and only one trial was conducted. The accused (Ivan Polyukhovich) was also acquitted and the Australian government then similarly ended its prosecutorial policy. More importantly, there were hardly any prosecutions by governments of their own agents accused of committing international crimes during this period – except the My Lai massacres trial discussed in Chapter 1. See *R v. Finta*, 61 D.L.R. 4th 85 (1989); *R v. Finta*, 50 C.C.C. 3d. 236; *R v. Finta*, [1994] 1 S.C.R. 701; *R v. Finta*, 112 D.L.R. 4th 13 (1994); and *Polyukhovich vs. Commonwealth of Australia*, (Australian High Court, 14 August 1991), 172 CLR 501.

⁷ Throughout the 20th century, the notion of State sovereignty has been “one of the most enduring obstacles for advancing international criminal law”. Steven Roach, *Politicizing the International Criminal Court: The Convergence of Politics, Ethics, and Law* (Plymouth: Rowman and Littlefield, 2006), at 19.

prosecution of core international crimes that previously existed been challenged? Despite the principle of complementarity ensuring that national systems retain primacy, has the ever lurking shadow of the Court then led States to close ranks against it?⁸

The final section thus deliberates on the appeal of ‘regionalism’ for States from various theoretical lenses. The underlying position of the research is that self-interested sovereign States must not only agree to uphold ICrimJ but also recognise the benefits of a regional solution. Hence, the aim is to determine whether neo-liberal interdependence theories (like neo-liberal institutionalism) or neo-realist systemic theory would provide theoretical support for regionalisation activities and explain inter-State relations between ASEAN Member States (AMS), thereby aiding in the subsequent assessment on the feasibility of regionalising ICrimJ in Southeast Asia.

2.1 State Sovereignty and the Avoidance of International Criminal Courts

As previously highlighted, the modern ICrimJ system and its substantive crimes have been shaped by international *realpolitik* and enforced according to the self-interest of States. This is most evidently illustrated by the various occasions that States avoided creating and losing control to an international judicial institution. Around the turn of the twentieth century, States simply ignored the first proposal to establish an international court – designed to prevent and address breaches of the 1864 Geneva Convention.⁹ Although 1899 and 1907 witnessed international initiatives to proscribe war crimes and protect civilians during war, the First and Second Hague Peace Conferences illustrated the problems of enforcement against sovereign and equal States.¹⁰ Legal and practical barriers against effective and regular implementation of

⁸ States have yet to renounce the sovereign model of international law, which ultimately weakens courts like the ICC that operate in “a legal framework with universal aspirations”. Mireille Delmas-Marty, “Ambiguities and Lacunae: The International Criminal Court Ten Years on”, *Journal of International Criminal Justice* 11 (2013): 553-561, at 555.

⁹ Reflecting the political sentiments and positivist legal nature of the period, most international law experts were critical of various aspects of the proposal by the President of the ICRC, Gustave Moynier, to strengthen the 1864 Geneva Convention. See Christopher Hall, “The First Proposal for a Permanent International Criminal Court”, *International Review of the Red Cross* 322 (1998): 57-74.

¹⁰ Due to Germany’s objection at the 1899 conference, the proposal for obligatory arbitration of certain types of disputes was abandoned to get it to accept the proposed Permanent Court of Arbitration. At the 1907 conference, although States agreed to codify war crimes in an international treaty, there was no consensus on binding themselves to adjudicate disputes regarding violations of these rules of war. For details, see David Caron, “War and International Adjudication: Reflections on the 1899 Peace Conference”, *American Journal of International Law* 94 (2000):4-30, at 15-22.

ICL by external parties then continued to be actively or otherwise erected by States, especially the global superpowers and regional hegemons.¹¹

State reluctance to relinquish power and control to an international criminal court, despite achieving agreement on the conceptual criminality of certain acts, would then become a recurring theme throughout much of the twentieth century. For instance, the League of Nations had tasked an Advisory Committee of Jurists to draw up plans for a court with international criminal jurisdiction in the wake of WWI. The Advisory Committee recommendations nonetheless failed to receive State support,¹² and it was later declared “useless to establish side by side with the Court of International Justice another Criminal Court, and that it is best to entrust criminal cases to the ordinary tribunals as is at present the custom in international procedure”.¹³ The next opportunity to develop an international court was after the assassination of King Alexander I of Yugoslavia and French Foreign Minister Barthou on 9 October 1934.¹⁴ Considered by the international community to be an act of terrorism, the League of Nations was spurred into action to tackle that threat.¹⁵ At the 1937 International Conference on the Repression of Terrorism, thirty-six countries approved the *Convention on the Prevention and Punishment of Terrorism (1937)*¹⁶ and *Convention for the Creation of an International Criminal Court (1937)*¹⁷ to prosecute individuals for terrorist acts. A lack of impetus and political will amongst

¹¹ Köchler, *supra* n.4, at 14.

¹² Several legal arguments presented against creating international jurisdiction to prosecute WWI war criminals include: (1) no defined notion of international crimes existed; (2) no international penal law existed; (3) the principle *nulla poena sine lege* would be disregarded; and (4) as only States were subjects of international law, individuals could only be punished in accordance with their national law. Ricardo Alfaro, “Report on the Question of International Criminal Jurisdiction”, *Yearbook of the International Law Commission, Vol. II* (1950), document A/CN.4/15 and Corr.1, at 4.

¹³ See quote in Alfaro, *ibid*, at 3-4.

¹⁴ For more details, see Tibor Eckhardt, *Regicide at Marseille* (New York: American Hungarian Library and Historical Society, 1964), at 115-116.

¹⁵ Given the grave consequences of the assassination of Archduke Ferdinand, the League of Nations established a committee to examine means to deal with terrorism. See Eric Leonard, *The Onset of Global Governance: International Relations and the International Criminal Court* (Hampshire: Ashgate, 2005), at 23.

¹⁶ *Convention for the Prevention and Punishment of Terrorism*, 16 November 1937. See League of Nations, *Proceedings of the International Conference on the Repression of Terrorism, Geneva, November 1st to 15th, 1937* (Geneva: League of Nations, 1938). Official No.: C.94.M.47.1938.V. Series of League of Nations Publications: V. LEGAL. 1938. V.3, at 5-17. Reproduced in Manley Hudson, *International Legislation – A Collection of the Texts of Multipartite International Instruments of General Interest, Vol. VII* (New York: Oceania Publications, 1972), at 862-78.

¹⁷ *Convention for the Creation of an International Criminal Court*, 16 November 1937. See League of Nations, *Proceedings of the International Conference on the Repression of Terrorism, Geneva, November 1st to 15th, 1937* (Geneva: League of Nations, 1938). Official No.: C.94.M.47.1938.V. Series of League of Nations Publications: V. LEGAL. 1938. V.3, at 19-37. Reproduced in Hudson, *ibid*, at 878-93.

States would however lead to only a single ratification, preventing the conventions from entering into force and again ensuring that an international criminal court was not formed.¹⁸

The reality of implementing and enforcing ICrimJ would also fail to match the rhetoric espoused by the international community after WWII. Indeed, it is clear that the Nuremberg and Tokyo military tribunals were not driven mainly, let alone solely, by the pursuit of ICrimJ.¹⁹ The decision to prosecute only vanquished enemy war criminals emphasised that political considerations²⁰ and State interests would define the enforcement of ICL.²¹ The charges of aggressive war and systematic violence committed by the Nazi government against its own citizens would further highlight how victorious States moulded ICL to suit their agenda.²² Compared to the Nuremberg Tribunal, the IMTFE was worse in terms of the lack of due process and disregard for separation of powers between political-military and judicial authority.²³ Köchler thus contends that when judged against the basic standards of the rule of law, the IMTFE “made the problems of ‘victors’ justice’ much more felt”.²⁴ Regardless of the proclaimed intentions for prospective criminalisation,²⁵ much of the immediate IMT and IMTFE outcomes were arguably geared towards one-sided retrospective

¹⁸ Some States feared that they could be used by tyrants to “interfere with asylum for political dissidents and refugees”. James Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (Westport: Greenwood Press, 1982), at 171; and Christopher Blakesley, “Obstacles to the Creation of a Permanent War Crimes Tribunal,” *Fletcher Forum of World Affairs* 18 (1994):77-102, at 83.

¹⁹ Köchler notes that the creation of a court where the Allies reserved the right to try leading German political and military officials made obvious the political context in which ICrimJ was located. Köchler, *supra* n.4, at 66.

²⁰ As the Soviets threatened to pull their troops from Allied occupied areas if their military leaders could be prosecuted for war crimes, the Allies agreed that jurisdiction of the IMT would extend only to Nazi and Italian officials. See Roach, *supra* n.7, at 25.

²¹ The tribunals did not prosecute any Allied soldier or military commander as they were not given such jurisdictions, and not because the Allied forces did not commit possible war crimes, crimes against peace, and crimes against humanity. They were thus clearly one-sided and imposed ‘victors’ justice’. M. Cherif Bassiouni, “Establishing an International Criminal Court: Historical Survey”, *Military Law Review* 149 (1995):49-64, at 55.

²² The IMT would overcome *ex post facto* and *nullem crimen sine lege* challenges by stretching that aggressive war was criminalised by international law – based on the breach of the Kellogg-Briand Pact. Overy thus contends that the framing of charges against the Nazis “required international law to be written backwards”. See Richard Overy, “The Nuremberg Trials: International Law in the Making”, in Phillippe Sands, ed., *From Nuremberg to the Hague* (Cambridge: Cambridge University Press, 2000), at 17. The IMT judgment and Kellogg-Briand Pact (1928) are (respectively) available at www.avalon.law.yale.edu/subject_menus/judcont.asp; www.yale.edu/lawweb/avalon/imt/kbpact.htm.

²³ The tribunal was created by decree of the Supreme Commander for the Allied Powers, General MacArthur, and its Charter was drafted by Joseph Keenan, who was later appointed as chief prosecutor by the Supreme Commander. Under Articles 2 and 3(a) of the Charter, the members and President of the Tribunal were also appointed by the Supreme Commander. See Appleman, *supra* n.3, at ix.

²⁴ Köchler, *supra* n.4, at 68.

²⁵ See Appleman, *supra* n.3.

retribution.²⁶ *Realpolitik* and the issue of state sovereignty would then continue to circumscribe the development of ICL.

After WWII, the effective reach of the initiatives to build on the progress made by the IMT and IMTFE and codify ICrimJ would again be curtailed by States. For example, a draft resolution was presented at the first United Nations General Assembly (UNGA) session in 1946 condemning ‘peacetime genocide’ after the IMT failure to do so,²⁷ and declaring that genocide was a crime that could be committed both in war and peace.²⁸ The Convention of the Prevention and Punishment of the Crime of Genocide was subsequently adopted on 9 December 1948.²⁹ It established a definition of genocide and called for enforcement “by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction”.³⁰ However, States noticeably omitted to develop any international supervisory mechanism or institutional capacity to do so.³¹ Donnelly observes that the Genocide Convention has then “remained purely declaratory and of little or no practical effect”.³²

In Resolution 260 (III) of 9 December 1948, the UNGA had also invited the International Law Commission (ILC) “to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with

²⁶ The selective enforcement of ICL however also meant that the Allies could make the political decision not to prosecute Japanese Emperor Hirohito. Regarding the IMTFE, scholars generally agree that “politics entered into the indictment process and the release policies for those imprisoned”. See Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, 2nd ed. (Cambridge: Cambridge University Press, 2011), at 99.

²⁷ The term genocide was first used by Lemkin in 1944 to describe the “destruction of a nation or of an ethnic group”, and “to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves”. Although the term appeared in the drafting of the IMT Charter, the term ‘crimes against humanity’ was eventually used to describe the persecution and mass murders committed by the Nazis. See Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation - Analysis of Government - Proposals for Redress*, (Washington, D.C.: Carnegie Endowment for International Peace, 1944), at 79.

²⁸ On 11 December 1946, UNGA resolution 96 (I) affirmed “that genocide is a crime under international law which the civilized world condemns”, and mandated the preparation of a draft convention on the crime of genocide. See General Assembly resolution 96 (I) of 11 December 1946 (The Crime of Genocide).

²⁹ After obtaining the requisite 20 ratifications, the Genocide Convention entered into force on 12 January 1951. See Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948.

³⁰ See Article VI of the Genocide Convention.

³¹ An early draft of the Convention by the UN Secretariat included a model statute for a court, but this proposal “was dropped in favour of a vaguer call for prosecution of the crime at either the national or international level” as stated in Article VI of the final Convention. Schiff, *supra* n.1, at 25.

³² Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2nd ed. (Ithaca: Cornell University Press, 2003), at 150.

genocide” or “certain other crimes under international law”.³³ While a draft statute was completed in 1951, it did not receive support from several leading countries.³⁴ Despite the strong drive by the international community after WWII to codify and institutionalize ICL goals and principles, the UNGA would soon shift its attention away from developing a draft code of offences³⁵ and draft statute for an international court³⁶. For example, a revised draft statute catering to the concerns of the major powers was presented in 1953,³⁷ but the UNGA then set aside its review pending a definition of aggression for the draft code of crimes.³⁸ By 1954, it would begin to postpone review of both items pending the definition of aggression by a new special committee.³⁹ Bassiouni contends that the history of these two tracts revealed “the lack of political will by the world’s major powers to join them in a coordinated endeavour”.⁴⁰ While further progress was “ostensibly pending the sensitive task of defining the crime of aggression”, Schabas similarly opined that it was in fact “largely dammed” by Cold War political tensions.⁴¹ During the second half of the twentieth century, States would therefore once again sidestep plans for an international court and avoid losing preeminent jurisdiction over international crimes.

³³ See General Assembly resolution 260 (Prevention and Punishment of the Crime of Genocide).

³⁴ France was the only major power that supported the idea of a permanent international criminal court. The Soviet Union feared its sovereignty would be affected, while the US would not agree to the idea at the height of the Cold War and the UK regarded it as premature. See M. Cherif Bassiouni, *The Statute of the International Criminal Court: A Documentary History* (Ardsey: Transnational Publishers, 1998), at 13.

³⁵ The UNGA had earlier instructed the International Law Commission (ILC) to formulate the international law principles recognised in the IMT Charter and judgment, and prepare “a draft code of offences against the peace and security of mankind”. See General Assembly resolution 177 (II) of 21 November 1947 (Formulation of the Principles Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal).

³⁶ The ILC had also been tasked “to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide” or “certain other crimes under international law”. See General Assembly resolution 260 of 9 December 1948 (Prevention and Punishment of the Crime of Genocide).

³⁷ See Revised Draft Statute for an International Criminal Court (Annex to Report of the 1953 Committee on International Criminal Jurisdiction on its Session held from 27 July to 20 August 1953). Official Records of the General Assembly, Ninth Session, Supplement No. 12 (A/2645).

³⁸ See General Assembly resolution 898 (IX) (International Criminal Jurisdiction).

³⁹ See General Assembly resolution 897 (IX) (Draft Code of Offences against the Peace and Security of Mankind) and General Assembly resolution 898 (IX) (International Criminal Jurisdiction). In 1957, after the report of the special committee was presented, the UNGA then decided to postpone consideration of both items “until such time as the General Assembly takes up again the question of defining aggression”. See General Assembly resolution 1186 (XII) (Draft Code of Offences against the Peace and Security of Mankind) and General Assembly resolution 1187 (XII) (International Criminal Jurisdiction).

⁴⁰ Bassiouni, *supra* n.34, at 11.

⁴¹ William Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 4th ed., 2011), at 9.

Given that States were able to shape the modern ICrimJ system and frustrate attempts to create a permanent international criminal court, they had successfully neutralised the threat of an external judicial body claiming jurisdiction and prosecuting their nationals for international crimes. Hence, there was no need for these unchallenged sovereign entities to consider the regionalisation of ICrimJ as an avenue to reassert national sovereignty or avoid their nationals being tried in international courts. The perspective of a self-interested State would have then undoubtedly changed with the creation of the ICC.

2.2 The ICC and the Threat to State Sovereignty

Arrested by the superpower rivalry of the Cold War, the evolution of the international system of ICrimJ would then only be revived with its end.⁴² The new environment permitted States to overcome the fear that international criminal courts would be used for political purposes by one ideological bloc against the other. After decades of near paralysis, the UNSC soon became involved in advancing ICrimJ through its enforcement powers under Chapter VII of the UN Charter.⁴³ It not only authorised the use of force in cases of international conflicts, but also established two *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda – the first supranational tribunals to be created since the IMT and IMTFE nearly fifty years earlier.⁴⁴ With the atrocities and genocide in these two places fresh on their mind, the international community arguably became persuaded that passivity in the face of serious breaches of ICL and the lack of accountability had produced a culture of impunity. On 9 December 1994, the UNGA then set up an *ad hoc* committee to review the major substantive and administrative issues arising out of a revised ILC draft statute for an international criminal court.⁴⁵

⁴² The Communist bloc collapsed in 1989 and preceded the disintegration of the Soviet Union in 1991.

⁴³ The end of the Cold War heralded the halt of the modicum of world order provided by the two superpowers in their respective spheres of influence. It resulted in fragmentation and uprisings in the global community, spurred on by fundamentalism and nationalism that had been previously suppressed.

⁴⁴ The history of these Tribunals however also crucially illustrate the inherent links between international politics and the enforcement of ICL, and the continuing role played by State-based considerations in the development of ICrimJ. See discussion in Chapter 1.

⁴⁵ The ILC modifications to the 1994 draft statute were notably again “intended to answer the political concerns of some of the world’s major powers”. It was also decoupled from the outstanding draft code of crimes that was later submitted to the UNGA in 1996. Bassiouni, *supra* n.34, at 25. See also General Assembly resolution 49/53 (Establishment of an International Criminal Court). UN Doc. A/Res/49/53; and Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996, Official Records of the General Assembly, Fifty-first session, Supplement No.10 (A/51/10).

Reminiscent of the period just after WWII,⁴⁶ this proffered the best chance in the latter half of the twentieth century for advocates to push the ICrimJ agenda for a permanent international judicial institution.⁴⁷ Their efforts would also be bolstered by several other factors. Firstly, the processes of globalisation resulted in an international environment that was less state-centric and more interdependent.⁴⁸ Secondly, there was a perceived change in the nature (and some argued decline) of state sovereignty.⁴⁹ Claims of non-intervention were believed to be no longer unquestionable and borders appeared to be more permeable under a stronger international human rights regime.⁵⁰ The authority of intergovernmental organisations (IGOs) was also thought to be on the rise.⁵¹ Thirdly, technological developments in the global age and the ‘CNN effect’ also meant that international news and current events were broadcast globally, leading to increased understanding and awareness of atrocities and international crimes occurring around the world.⁵²

Two key stepping stones were therefore now in place to establish a permanent international criminal court: (1) a draft statute for an international criminal court, and a codified set of international criminal laws that was accepted as customary law;⁵³ and

⁴⁶ Cassese notes the atrocities in the former Yugoslavia and Rwanda rekindled “the sense of outrage felt at the closing stage of the Second World War”, while Akhavan argues they “assumed a similar role in the post Cold War era as the twin pillars of moral outrage upon which the beginnings of an international criminal jurisdiction can be discerned”. See Antonio Cassese, *International Law*, 2nd ed. (Oxford: Oxford University Press, 2005), at 455; and Payam Akhavan, “The Yugoslav Tribunal at a Crossroads: The Dayton Peace Agreement and Beyond”, *Human Rights Quarterly* 18 (1996):259-285, at 269.

⁴⁷ The impetus for a permanent international criminal court arose from the call by Trinidad and Tobago in 1989 to restart discussions at the UN, so as to advance international prosecutions for drug offences.

⁴⁸ Scholars nevertheless stress that globalisation does not “simply prefigure the demise of the nation-state or even the erosion of state power”. David Held et al., *Global Transformations: Politics, Economics and Culture* (Cambridge: Polity Press, 1999), at 436.

⁴⁹ Broomhall highlights that the end of the Cold War did not however alter the role of States in making decisions about international peace and security, or the enforcement of ICL. A replacement or realignment of state sovereignty was thus unrealistic in the near future. Bruce Broomhall, *International Justice and the International Criminal Court –Between Sovereignty and the Rule of Law* (Oxford: Oxford University Press, 2003), at 5.

⁵⁰ Barkin believed that human rights norms had begun to replace “territorial legitimation” as a defining feature of sovereignty after the Cold War and interventions in States that violated human rights could be more easily justified. This has however since proven to be untrue. See J Samuel Barkin, “The Evolution of the Constitution of Sovereignty and the Emergence of Human Rights Norms”, *Millennium* 27 (1998):229-252, at 246

⁵¹ See Leonard, *supra* n.15, at 32; and Yale Ferguson, “Postinternationalism and the Future of IR Theory”, in Heidi Hobbs, ed., *Pondering Postinternationalism: A Paradigm for the Twenty-First Century?* (Albany: State University of New York, 2000).

⁵² This has led to a new “legitimation environment”, where States are increasingly pressured by their citizens to account for their actions. Broomhall, *supra* n.49, at 5.

⁵³ The UN Secretary-General’s report, on the establishment of the ICTY, stated that tribunal would only “apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise”. See Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (1993), at para 34.

(2) a renewed political will amongst States to prevent impunity for international crimes coupled with a permissive international environment. The UNGA would soon establish a Preparatory Committee (PrepCom) to prepare a “widely acceptable consolidated text of a convention for an international criminal court” in December 1995.⁵⁴ It considered about 500 additional proposals and amendments to the ILC draft statute received from States, many regarding the definition of crimes and criminal law principles and procedures.⁵⁵ The UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court then began on 15 June 1998.⁵⁶ Its final plenary session approved the ICC Statute,⁵⁷ which entered into force on 1 July 2002 after ratification by sixty States.

While the negotiating process at the Conference may be said to illustrate the inability of powerful States to dictate the ICL rules and procedures, it must be recognised that the highly sensitive political issues had already been identified and considered. For example, Cassese notes that a cautious approach was taken on the subject matter jurisdiction of the ICC “to facilitate as rapid and as widespread acceptance of the Statute as possible”.⁵⁸ The ILC in the early stages anticipated that few States would agree to sign a treaty in which their own sovereignty would be subordinated to the jurisdiction of the ICC.⁵⁹ The solution was then for the ICC to exercise its mandate on the basis of complementarity and involve the national courts of each State Party.⁶⁰ Werle observes that substantive issues, particularly the

⁵⁴ The PrepCom later submitted its report on 28 October 1996, and recommended the production of a consolidated text of a convention, statute and annexed instruments by 1998. See UN General Assembly resolution 50/46 (Establishment of an International Criminal Court). UN Doc. A/Res/50/46; and UN General Assembly resolution 51/207 (Establishment of an International Criminal Court).

⁵⁵ Some States felt that such matters “should not be left to the Court or the judges to develop, but must be formulated by the negotiating States”. Roy Lee, “Introduction”, in Roy Lee, ed., *The International Criminal Court: The Making of the Rome Statute* (The Hague: Kluwer Law International, 1999), at 4.

⁵⁶ Delegates from more than 160 States discussed and debated the 173-page PrepCom draft statute containing 116 Articles. See Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute for the International Criminal Court and Draft Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (A/CONF.183/2/Add.1).

⁵⁷ The ICC Statute was approved by a count of 120 nation-states in favour, 7 opposed, and 21 abstentions.

⁵⁸ Cassese, *supra* n.46, at 456.

⁵⁹ As noted earlier, an underlying objective of the ILC's watered-down 1994 Draft Statute was to address the political concerns of the major powers and ensure them that the Court's jurisdiction would not pre-empt their sovereignty. It was “protective of States' sovereignty”, particularly in terms of the ‘trigger mechanisms’ and the ‘opt-in provisions’ for States to accept the jurisdiction of the Court. See Cryer *supra* n.26, at 120-121.

⁶⁰ The complementarity principle ensured that the ICC would not supersede national processes of investigation and prosecution, and that its jurisdiction would remain compatible with the ability and willingness of States to try the perpetrators of international crimes.

definitions of crimes, were also less controversial during the Rome Conference also due to their “early limitation” to a small set of precisely defined core crimes, which had clear and relatively high thresholds.⁶¹ By expressly defining and limiting the crimes within ICC jurisdiction in the Statute, it sought to assuage the concerns of States that the Court would be left to interpret general international law when prosecuting their citizens, particularly high-ranking government officials.⁶²

Another crucial point to note is that the ICC was created under international treaty law.⁶³ As such, the Rome Statute was ultimately a multilateral treaty negotiated between States, with countries free to not sign up at all.⁶⁴ For those that did, it included strong protections for state sovereignty. Firstly, as States were unwilling to permit past crimes to be prosecuted under any circumstances, the ICC has only been given jurisdiction with respect to crimes committed after the entry into force of the Rome Statute (Article 11).⁶⁵ Secondly, while the crimes included in the ICC Statute may attract universal jurisdiction, States set strict preconditions to the exercise of jurisdiction (Article 12).⁶⁶ Thirdly, besides setting high definitional thresholds for the crimes within the jurisdiction of the ICC, States also managed to secure carve-outs in various provisions. For example, regarding non-international armed conflicts, the Court will not have jurisdiction over “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of similar nature (Article 8(2)(d)).⁶⁷ Moreover, nothing will affect the responsibility of a Government

⁶¹ Werle, *supra* n.5, at 21.

⁶² Moreover, although the range of international crimes could be later expanded, it had to be done with the consent of State parties, and only after the new crimes had “established credibility and gained the respect of the international community”. Cassese, *supra* n.46, at 456.

⁶³ The ILC had recognised as early as 1994 that a multilateral treaty was the best way for the ICC to be both legitimate and politically viable. See Report of the International Law Commission on the work of its forty-sixth session, 2 May-22 July 1994, Official Records of the General Assembly, Forty-ninth session, Supplement No. 10, (A/49/10). Roach notes that this was preferred over other options including: (1) amending the UN Charter, which many believed would take too long to implement; and (2) a UN Security Council resolution, which some argued would present too many conflicts of interest, including control over the judiciary process by the UNSC. See Roach, *supra* n.7, at 32; and Roger Clark, “The Proposed International Criminal Court: its Establishment and its Relationship with the United Nations”, *Criminal Law Forum* 8 (1997):411-430, at 415-421.

⁶⁴ It is important to note that out of the five permanent members of the UN Security Council, only the UK and France are State Parties to the ICC Rome Statute.

⁶⁵ See Article 11, ICC Statute.

⁶⁶ See Article 12(2), which requires the Court to exercise jurisdiction only if it had obtained the consent of the territorial State or the State of nationality. For background, see Sharon Williams and William Schabas, “Article 12”, in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2nd ed. (Oxford: Hart Publishing, 2008); and Elizabeth Wilmschurst, “Jurisdiction of the Court”, in Roy Lee, ed., *The International Criminal Court: The Making of the Rome Statute* (The Hague: Kluwer Law International, 1999).

⁶⁷ See Article 8(2)(d), ICC Statute.

to employ all legitimate means “to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State” (Article 8(3)).⁶⁸ Fourthly, to address concerns about a maverick ICC Prosecutor pursuing a personal agenda, States ensured that there are checks on the power to begin investigations *proprio motu*. These include complex admissibility requirements, including the need to inform all States with jurisdiction over the crimes concerned before proceeding, and to defer to genuine investigations by a State (Article 18).⁶⁹ Fifthly, although the Rome Statute (Articles 86-102) lists the various forms of cooperation that the ICC can request of State Parties, the Court cannot compel such cooperation either in theory or practice, and must rely on the UNSC or ICC Assembly of States Parties.⁷⁰ Last but not least, a critical dependence on State resources and cooperation in enforcement means that the ICC is unlikely to stray far from its mandate.

It is clear that both the development and enforcement of ICL still remain within the control of States. Nevertheless, the absolute sovereignty over the prosecution of international crimes that previously existed has to an extent been challenged with the establishment of the ICC. Although the principle of complementarity allows States to assume jurisdiction over crimes committed within their territorial boundaries or by their nationals, the ICC can still intervene when it deems that national courts are unable and/or unwilling to prosecute suspected individuals (Articles 17(2) and 17(3)).⁷¹ The Court only has to “satisfy itself” that it has jurisdiction and may “on its own motion” determine the admissibility of a case (Article 19(1)).⁷² Furthermore, the Rome Statute not only declares the irrelevance of official capacity such as a Head of State or Government for the purposes of exemption from criminal responsibility or reduction of sentence, but also states that immunities or special procedural rules associated with such persons cannot bar the Court from exercising its jurisdiction (Article 27).⁷³ The indictment and issuance of the arrest warrant for sitting Sudanese President Omar Hassan Ahmad al-Bashir,⁷⁴ who has been

⁶⁸ See Article 8(3), ICC Statute.

⁶⁹ See Article 18, ICC Statute.

⁷⁰ See Article 87(7), ICC Statute.

⁷¹ See Articles 17(2) and 17(3), ICC Statute.

⁷² See Article 19(1), ICC Statute.

⁷³ See Article 27, ICC Statute.

⁷⁴ The ICC Pre-Trial Chamber I first indicted al-Bashir as an indirect perpetrator of five counts of crimes against humanity, and two counts of war crimes. A second warrant of arrest was issued for three counts of genocide. See Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, 4 March 2009; and Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, 12 July 2010.

in power since seizing control in a bloodless coup in 1989,⁷⁵ was the first clear illustration of the challenge to State Sovereignty under the ICC regime.⁷⁶

In the name of regional peace and solidarity, neighbouring African countries have however collaborated to circumvent action by the ICC or simply refused to accept its indictments.⁷⁷ At the Thirteenth Summit of Heads of States in 2009, the AU passed a resolution prohibiting its member countries from cooperating with the ICC arrest warrant against President Al-Bashir.⁷⁸ At subsequent Summits, AU leaders have reiterated the decision to withhold cooperation and the call for a UNSC deferral of the prosecution.⁷⁹ A similar response against the indictment was evoked amongst various other regional and sub-regional bodies.⁸⁰ Regional resistance against the Court is then verified by the fact that President Al-Bashir is able to travel relatively freely within the African region without fear of arrest or prosecution, and even attends regional summits.⁸¹ For example, he attended the AU Summits in Nigeria (July 2013) and

⁷⁵ President Al-Bashir has indicated to the Sudanese press that he intends to step down in 2015.

⁷⁶ ICC trials have now also been initiated against Kenyan President Kenyatta and Vice President Ruto. There has since been a Kenyan initiative to amend the Rome Statute regarding, *inter alia*, the irrelevance of official capacity (Article 27) and trial in the presence of the accused (Article 63). See discussions in Chapters 2 and 4.

⁷⁷ The failure of the UNSC to accede to the AU's repeated calls for it to invoke Article 16 of the ICC Statute to suspend the processes initiated against President Al-Bashir has led African States to withhold cooperation from the Court in respect to his arrest and surrender. Some scholars believe failure to resolve the Article 16 issue could further damage the ICC's credibility in Africa and also lead to future problems in other parts of the world. Charles Jalloh, Dapo Akande, and Max du Plessis, "Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court", *African Journal of Legal Studies* 4 (2011):5-50.

⁷⁸ See Decision on the Meeting of African State Parties to the Rome Statute of the International Criminal Court (ICC), Doc. Assembly/AU/13(XIII), Assembly of the African Union, Thirteenth Ordinary Session, 1-3 July 2009, Libya.

⁷⁹ See Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC), Doc. Assembly/AU/10(XV), Assembly of the African Union, Fifteenth Ordinary Session, 25-27 July 2010, Uganda; Decision on the Implementation of the Decisions on the International Criminal Court (ICC), Doc. EX.CL/639(XVIII), Assembly of the African Union, Sixteenth Ordinary Session, 30-31 January 2011, Ethiopia; and Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC) - Doc. EX.CL/710(XX), Assembly of the African Union, Eighteenth Ordinary Session, 29-30 January 2012, Ethiopia.

⁸⁰ The Arab League, Organization of Islamic Conference (OIC), Gulf Cooperation Council and the Non Aligned Movement have publicly backed the AU deferral request and efforts to rein in the ICC. For example, see "Arab leaders back 'wanted' Bashir", *BBC*, 30 March 2009, at http://news.bbc.co.uk/2/hi/middle_east/7971624.stm; "Arab League agrees to rejecting ICC's arrest warrant for Sudanese President Al-Bashir", *Xinhua*, 29 March 2009; and "OIC Secretary General strongly rejects the ICC indictment against President of the Sudan", 4 Mar 2009, at www.oic-oci.org/topic_detail.asp?t_id=1971.

⁸¹ The AU affirmed that by receiving President Al-Bashir, countries were implementing Assembly Decisions on non-cooperation with the ICC" regarding his arrest and surrender. See Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC) - Doc. EX.CL/710(XX), Assembly of the African Union, Eighteenth Ordinary Session, 29-30 January 2012, Ethiopia.

Ethiopia (October 2013 and January 2014), in line with the AU decision not to cooperate with the ICC.⁸² President Al-Bashir most recently also attended a Common Market for Eastern and Southern Africa (COMESA) summit in the Democratic Republic of the Congo (DRC) in February 2014.⁸³

This is in stark contrast to limits placed on his ability to travel outside the region.⁸⁴ If a State felt that it had no option but to arrest him and transfer him to The Hague if he visited the country, it would pre-empt the situation and simply not invite him. This was evidenced both in relation to President Al-Bashir's announcement of plans to attend the UN General Assembly meetings in 2013, and during the 2010 inauguration of South African President Zuma. In the former case, there were diplomatic efforts by the US to convince him not to visit the US, including warnings that it could not guarantee he would not be arrested.⁸⁵ In the latter case, the South African government likewise explained the situation to the Sudanese Ambassador in Pretoria and avoided a diplomatic incident.⁸⁶ Other African countries (like Malawi, Djibouti, Chad, Kenya, Nigeria, and DRC) however simply failed to honour duties assumed by ratifying the ICC Treaty, and allowed President Al-Bashir to visit without executing the arrest warrant against him.

The growing AU emphasis on the sovereignty of its member states and hostility against the ICC, while ostensibly directed at the Al-Bashir case,⁸⁷ is likely also a reflection of the general concern that similar indictments may be laid against political and military leaders in other African countries.⁸⁸ Even though national

⁸² The ICC requested Nigeria to arrest President Al-Bashir during his visit to Abuja and surrender him to the Court, but he was able to leave the country before any action was taken. The ICC later cleared Nigeria of any charge on its failure to arrest him. See "Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar Al-Bashir's Arrest and Surrender to the Court", ICC-02/05-01/09, 5 September 2013.

⁸³ The ICC Pre-Trial Chamber II found that the DRC had deliberately failed to arrest and surrender him to the ICC. See "Decision on the Cooperation of the Democratic Republic of the Congo regarding Omar Al Bashir's Arrest and Surrender to the Court", Doc. ICC-02/05-01/09, 9 April 2014.

⁸⁴ President Al-Bashir has been forced to cancel several international visits, and his plane even denied passage through the airspace of Turkmenistan, Saudi Arabia and Tajikistan. It is possible that he also cancelled plans to attend the UN General Assembly in September 2013 due to fears of being arrested.

⁸⁵ See "Sudanese President will not fly to US for UN General Assembly meetings", *Sudan Tribune*, 26 September 2013, at www.sudantribune.com/spip.php?article48184.

⁸⁶ See "Sudanese President to skip Zuma's Inauguration", *Sudan Tribune*, 9 May 2009, at www.sudantribune.com/spip.php?article31109.

⁸⁷ Dire Tladi, "The African Union and the International Criminal Court: The battle for the soul of international law", *South African Yearbook of International Law* 34 (2009): 57-69.

⁸⁸ The AU has most recently called for the ICC prosecution of Kenyan President Kenyatta and Vice President Ruto to be suspended until they complete their terms of office. It decided that "to safeguard the constitutional order, stability and, integrity of Member States, no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office". See

systems retain primacy under the principle of complementarity, the ever lurking spectre of a permanent ICC has thus led some States to consider ways to legitimately prevent the ICC from exercising its jurisdiction. As States will not admit to a need for breaching international norms and laws, let alone allowing impunity for core international crimes,⁸⁹ the regionalisation of ICrimJ has therefore gained political currency.⁹⁰ From the point of view of States, besides the practical benefits discussed in Chapter 1, regional mechanism provide both a credible alternative and extra layer between States and the ICC.⁹¹ As noted earlier, they are more reflective of regional norms and political considerations, and crucially put States firmly back in the driver's seat on ICrimJ issues in their own backyard.⁹² They will also allow States to target issues and crimes that may be pertinent but unique to their region.⁹³ In this connection, it is noteworthy that an amendment to the Preamble of the ICC Statute regarding its complementarity has been suggested, which may facilitate AU efforts to create a regional court to prosecute alleged crimes committed on the continent.⁹⁴

At this juncture, it must be added that regionalising ICrimJ can also benefit the ICC's work and help the Court achieve its goals of punishing and deterring international crimes, by alleviating two systemic problems highlighted in Chapter 1. Firstly, the Court can only prosecute a small fraction of international crimes due to resource and practical constraints, and States are anticipated to bear most of the burden

Decision on Africa's Relationship with the International Criminal Court (ICC), Doc. Ext/Assembly/AU/Dec.1 (Oct.2013), Extraordinary Session of the Assembly of the African Union, 12 October 2013, Ethiopia.

⁸⁹ This may nonetheless occur, for example, when amnesties are traded for peace or a regime change in a political settlement. See discussion in Chapter 4.

⁹⁰ This is most clearly highlighted by the AU's preference for African solutions to African problems, which was again signalled in its declaration regarding the ICC investigations in relation to the 2008 post election violence in Kenya. See AU Decision EX.CL/639(XVIII), *supra* n.79.

⁹¹ Jalloh contends that an enhanced capacity to prove both willingness and ability to punish international crimes may be the best way to deprive the ICC of jurisdiction and counter any attempts to encroach on state sovereignty. Charles Jalloh, "Regionalizing International Criminal Law?", *International Criminal Law Review* 9 (2009): 445-499, at 472.

⁹² This will undoubtedly be bolstered by the argument of maintaining or restoring regional peace and security. For example, Sirleaf concluded after examining the transitional justice mechanisms in Liberia and Sierra Leone that a regional approach was "more likely to achieve the goals of long-term peace, stability, and respect for human rights within the region". Matiangai Sirleaf, "Regional Approach to Transitional Justice? Examining the Special Court for Sierra Leone and the Truth & Reconciliation Commission for Liberia", *Florida Journal of International Law* 21 (2009): 209-284 at 280.

⁹³ See discussion in Chapter 5.

⁹⁴ Amongst other amendments to the Rome Statute, Kenya suggested changes to the preamble setting out the complementary nature of the ICC Statute. The AU subsequently asked Member States to ensure that the Kenyan proposed amendments were considered by the ICC ASP. See Decision on the Progress Report of the Commission on the Implementation of the Decisions on the International Criminal Court, Doc. Assembly/AU/Dec.493(XXII), Assembly of the African Union, 30-31 January 2014, Ethiopia.

in ensuring accountability.⁹⁵ Secondly, the ICC lacks a police force or associated enforcement arm, and is unlikely to establish one due to high financial cost and other practical hurdles. Without State support, not only will the indictments and decisions issued by the ICC not be enforced, but a large proportion of crimes will ultimately also go unpunished. While the Rome Statute has raised the ICrimJ standards of individual accountability and provided indirect incentives (namely the avoidance of possible ICC action) for domestic enforcement of ICL, it currently cannot compel States to go against their own national interest. Even though all State Parties are obligated under the Rome Statute to support its work, the ICC can do little when a State Party fails to follow through on its obligations, except make a finding to that effect and refer the matter to the Assembly of States Parties.⁹⁶ The fact that the discretion and decision to act ultimately remain under the control of the State exposes the inherent contradiction between the State-limiting objectives of ICL and State-based enforcement mechanisms.⁹⁷ Akhavan thus points out that the absence of an obligation for national prosecution is inconsistent with an effective system of complementarity,⁹⁸ and the limited and disjointed obligations under treaty and customary international law inevitably present problems for enforcing ICL.⁹⁹

A strong argument for regional criminal courts or mechanisms is that they will then help narrow the impunity gap that may exist between the international and national levels. The strategy of the ICC to focus on persons who bear the most responsibility for crimes within its jurisdiction will leave an impunity gap unless all appropriate means for bringing other perpetrators to justice are used. Complementarity

⁹⁵ The ICC only has the capacity to prosecute a small number of cases in the few situations/conflicts that it is seized of. Morten Bergsmo, "Complementarity and the Challenges of Equality and Empowerment", *FICHL Policy Brief Series* 8 (2011):1-4, at 1.

⁹⁶ The ICC may however turn to the UN Security Council, if it had referred the matter to the Court. See Article 87(7), ICC Statute.

⁹⁷ Broomhall thus acknowledges that "[t]he regular enforcement of criminal law has always required coercion, and the authority to deploy coercive power internationally remains firmly in the hands of States – States that make their decisions on the basis of national interests calculations bearing no necessary relationship to the needs of international justice". Broomhall, *supra* n.49, at 2.

⁹⁸ The ICC Statute does not impose a direct duty for a State to prohibit the crimes under the Statute, or oblige them to extradite or prosecute suspects.

⁹⁹ Akhavan suggests that, as a solution, States could adopt an Optional Protocol to the Rome Statute enshrining an express and enforceable obligation to exercise national jurisdiction. See Payam Akhavan, "Whither National Courts? The Rome Statute's Missing Half - Towards an Express and Enforceable Obligation for the National Repression of International Crimes", *Journal of International Criminal Justice* 8 (2010): 1245-1266.

is envisioned to “play a part” by encouraging and facilitating national prosecutions.¹⁰⁰ Under the ICC Statute, the principle of complementarity however currently applies to States and not regional bodies or organisations.¹⁰¹ Nevertheless, working with the regional community may amount to nothing more than an added, but potentially useful, layer in the complementarity scheme.¹⁰² For example, an intermediate regional initiative could help ICC determine whether a State is unwilling or unable to carry out the investigation or prosecution, and also address concerns about the impartiality of domestic courts.¹⁰³ Furthermore, treaty-based regional approaches could help secure the commitment of neighbouring States towards ICrimJ and the enforcement of ICL, as well as the fulfilment of treaty obligations to prosecute or extradite suspected perpetrators of international crimes.¹⁰⁴

It is noteworthy that support for the ICC depends in large part on its image as a trusted and reputable institution. For the Court, creating and maintaining this image largely depends on the legal soundness and objectivity of its work. As powerful countries like the US, China and Russia sidestep ICC jurisdiction, some African countries like Sudan and Kenya are understandably viewing and painting themselves as victims of selectivity and bias.¹⁰⁵ Regardless of the validity of such claims, non-regional countries and even the UN had previously also not acted upon the ICC's decisions.¹⁰⁶ For example, little effort had been made by the UN to enforce the

¹⁰⁰ This may be done by strengthening or rebuilding the domestic judicial system, and providing international assistance. See ICC OTP, *Paper on some policy issues before the Office of the Prosecutor* (2003), at 7; and “Taking stock of the principle of complementarity: bridging the impunity gap”, *Review Conference*, Resolution ICC-ASP/8Res.9, 25 March 2010, at Appendix.

¹⁰¹ This may however change if the Kenyan proposed amendment to the preamble setting out the complementary nature of the ICC Statute is accepted by the ICC ASP.

¹⁰² For a discussion, see Max Du Plessis, Antoinette Louw, and Otilia Munganidze, “African Efforts to Close the Impunity Gap: Lessons for Complementarity from National and Regional Actions”, *Institute for Security Studies Paper* 241, November 2012.

¹⁰³ The risks of bias regarding innocence or guilt, partiality and improper standards are high – especially if political leaders or government agents are subject to their own Courts or disciplinary procedures.

¹⁰⁴ This will be particularly relevant in relation to countries that are not ICC State Parties, where the challenges of ensuring real and effective domestic enforcement are equally if not more daunting.

¹⁰⁵ Currently, all of the cases before the ICC are against Africans. Ambos however argues that the criticism against the ICC, is misleading for essentially three reasons: (1) Africa was heavily involved in the creation of the ICC; (2) there are also many Africans that support the ICC; (3) there are objective legal and policy reasons that explain why the cases before the ICC mainly come from Africa. Kai Ambos, “Expanding the Focus of the ‘African Criminal Court’”, in **William Schabas, Yvonne McDermott, and Niamh Hayes (eds.)**, *Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Aldershot, Ashgate, 2012).

¹⁰⁶ On 28 March 2013, the UN Security Council however notably passed resolution 2098, which authorises UN Organization Stabilization Mission in the DRC (MONUSCO) peacekeepers to “support and work with the Government of the DRC to arrest and bring to justice those responsible for war crimes and crimes against humanity in the country, including through cooperation with States of the region and the ICC”. See Security Council resolution 2098 (2013), UN Doc. S/Res/2098(2013).

outstanding ICC arrest warrants for Sudanese leaders.¹⁰⁷ In June 2014, the ICC prosecutor even criticised the UN Security Council for not taking action against the government of Sudan or pushing for the arrest of President Al-Bashir and others for international crimes committed in Darfur.¹⁰⁸

Given that *realpolitik* limits the efficacy of the ICC, the importance of regional considerations and support cannot be understated. This point is further highlighted by the Kenyan crusade that began in 2011 to get AU countries to support its bid to defer ICC trials against four individuals.¹⁰⁹ During the AU Summit in May 2013, African leaders passed a resolution urging the ICC to refer the cases back to Kenyan courts, including those against President Uhuru Kenyatta and Vice President William Ruto.¹¹⁰ At its Extraordinary Summit in October 2013, the AU then called for the ICC prosecution to be suspended until the Kenyan political leaders left office.¹¹¹ While the African region has been largely supportive of the ICC and boasts 34 State Parties to the Rome Statute, this marks the turning point when the 54-nation AU first formally opposed the Court.¹¹² After Kenya suggested amendments to the ICC Statute at the ASP conference in November 2013,¹¹³ the AU requested African State Parties to

¹⁰⁷ The UN has even provided helicopter transportation for Ahmad Harun, the ICC-indicted Sudanese former Minister of State for the Interior. It said that facilitating transportation for Harun, who was governor of the war-torn South Kordofan region, was crucial in ending the conflict there. The ICC Chief Prosecutor noted that the UN Legal Advisor had informally commented that the “use of the helicopter appeared to be supportable, but should be restricted as much as possible”. See “Press Conference by Chief Prosecutor of International Criminal Court”, 8 June 2011, at www.un.org/News/briefings/docs/2011/110608_ICC.doc.htm

¹⁰⁸ See “Justice for Darfur’s victims mired in political expediency – ICC prosecutor”, 17 June 2014, at www.un.org/apps/news/story.asp?NewsID=48071.

¹⁰⁹ The Kenyan efforts gathered momentum after the President of Malawi and then-AU chairman expressed support for a domestic mechanism to investigate and prosecute the cases. The AU subsequently endorsed Kenya’s campaign to also defer proceedings under Article 16 of the Rome Statute. See AU Decision EX.CL/639(XVIII), *supra* n.79.

¹¹⁰ In support of the Kenyan judicial system, AU Peace and Security Commissioner Ramtane Lamamra stressed that such cases could now be heard domestically because Kenya’s new legal system was “much stronger and more independent”, while AU Commission Chairwoman Nkosana Dlamini-Zuma publicly added that the ICC should be a court of last resort and not the first port-of-call for legal matters. See “African Union Summit Backs Return of Kenyan ICC Cases” at www.bloomberg.com/news/2013-05-27/african-leaders-set-to-back-return-of-kenyan-icc-cases.html; and “AU backs Kenya’s bid to end International Criminal Court trial” at www.dw.de/au-backs-kenyas-bid-to-end-international-criminal-court-trial/a-16839425.

¹¹¹ See AU Decision Ext/Assembly/AU/Dec.1 (Oct.2013), *supra* n.88.

¹¹² The ICC has dismissed the AU resolution and stressed that the Court operates “independently on the basis of the law and the available evidence and are not based on regional or ethnic considerations”. It was also not convinced that Kenya was capable of conducting genuine investigations and prosecutions. See ICC Press Release, “ICC underlines impartiality, reiterates commitment to cooperation with the African Union”, 29 May 2013, at www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr908.aspx.

¹¹³ The amendments cover the ICC complementarity regime (Preamble); irrelevance of official capacity (Article 27); trial in the presence of the accused (Article 63); offenses against the administration of justice (Article 70); and creating an Independent Oversight Mechanism (Article 112(4)).

ensure that the Kenyan request for deferral and proposals were considered by the ASP at its forthcoming sessions.¹¹⁴ These regional developments are particularly pertinent as the AU has consistently accused the ICC of specifically targeting Africans.¹¹⁵ Although it is a charge that the Court vehemently denies, with the Kenyan parliament voting for the country to withdraw from the jurisdiction of the ICC,¹¹⁶ other African State Parties may also find reasons to do so too.

As part of Africa's reassessment of its association with the ICC,¹¹⁷ there have been suggestions of developing regional capabilities to address allegations and prosecute perpetrators of serious international crimes committed on the continent.¹¹⁸ The fact that the AU had, **based on a report** of the Committee of Eminent African Jurists, decided that the case against Hissène Habré fell within its competence is perhaps telling of the intended direction of the regional organisation.¹¹⁹ Debate has then begun on whether the African Court of Human and Peoples' Rights (AfCHPR)¹²⁰ should include the 'core crimes' of the ICC in its jurisdiction.¹²¹ Other crimes have also been listed to tackle areas of concern to the continent, like piracy and trafficking in drugs.¹²² Murungu notes that a factor behind the push for jurisdiction over

¹¹⁴ See AU Decision Assembly/AU/Dec.493(XXII), *supra* n.94.

¹¹⁵ Indeed, scholars contend that "without expanding to other corners of the world, the ICC does indeed risk being branded, at best, as a selective prosecutor, and at worst, as a purveyor of racially conscious justice". Richard Goldstone and Adam Smith, *International Judicial Institutions: The Architecture of International Justice at Home and Abroad* (Oxon: Routledge, 2009), at 113.

¹¹⁶ Under Article 127 of the Rome Statute, a withdrawal by Kenya will only take effect one year after a formal notification is made. Thus far, the Kenyan government has not made such a notification.

¹¹⁷ As many African countries are State Parties to the Rome Statute, they are torn between obligations towards the AU and the ICC. A significant development of the 2013 AU Summit was the draft resolution to withdraw the participation of AU member countries in the ICC. Prime Minister of Ethiopia and AU Chairman Hailemariam Desalegn stated that African leaders were concerned that 99% of those indicted by the ICC were Africans, and this "shows something is flawed within the system of the ICC and we object to that". See BBC, "African Union accuses ICC of 'hunting' Africans", 27 May 2013, at www.bbc.co.uk/news/world-africa-22681894.

¹¹⁸ Tladi, *supra* n.87.

¹¹⁹ Williams however argues that the subsequent creation of the Extraordinary African Chambers in the Senegalese Courts (EAC) is attributable more to the mistaken analysis of the ECOWAS Court on the principle of *nullum crimen sine lege* than a lack of good faith by the AU. Sarah Williams, "The Extraordinary African Chambers in the Senegalese Courts: An African Solution to an African Problem?", *Journal of International Criminal Justice* 11 (2013): 1139-1160.

¹²⁰ In 2009, AU leaders requested the AU Commission to assess the implications of recognising AfCHPR jurisdiction to try international crimes like genocide, crimes against humanity and war crimes.

¹²¹ The AU has considered a draft protocol to expand the AfCHPR jurisdiction to include crimes against humanity, war crimes and genocide. A ministerial meeting in May 2012 approved the draft protocol and recommended its adoption. The draft protocol is at www.peaceau.org/uploads/ex-cl-731-xxi-e.pdf. For a commentary, see Gino Naldi and Konstantinos Magliveras, "Africa Contemplates Creating International Criminal Law Entity", *Accountability* (2012), at www.asil.org/accountability/pdf/summer2012/AFRICA%20CONTEMPLATES%20CREATING%20INTERNATIONAL%20CRIMINAL%20LAW%20ENTITY.pdf.

¹²² The court may also try individuals for various other offences, including: the crime of unconstitutional change of government; terrorism; mercenarism; corruption; money laundering;

international crimes is “the indictment and prosecution of African state officials” by the ICC or some European countries.¹²³ Du Plessis highlights that while those drafting the protocol to expand the African Court’s jurisdiction stressed motivations other than anti-ICC sentiment, it is revealing that it completely disregards the ICC and inexplicably ignores the potential overlap between the two judicial bodies.¹²⁴ This may be an indication that the AU is positioning its members to withdraw from, if not then sidestep, the ICC. This view is supported by the AU decision in October 2013 to fast track the process of expanding the AfCHPR mandate to try international crimes, in light of the ICC indictment and prosecution of Kenyan President Kenyatta and Deputy President Ruto.¹²⁵

In this regard, the development of ICL has arguably reached a plateau at the international level with the ICC, as the promotion of regular compliance and effective enforcement are still greatly dependent on diplomatic considerations, as well as other political, economic and strategic calculations by States. In line with its strategy to limit the impunity gap by using all appropriate means to bring perpetrators of international crimes to justice,¹²⁶ the Court will benefit from engaging with any regional initiatives that may develop. Recognising the value of partnerships with such regional mechanisms will help the ICC remain involved and relevant, especially if States face conflicting obligations to the Court and regional organisations.¹²⁷ Indeed, the ICC can benefit by recognising diversity in regional focus, accommodating variations in approaches to crimes, and incorporating regional solutions into its work. This will be crucial in convincing State Parties to the Rome Statute not to eschew compliance or completely withdraw their support for the ICC.

At the same time, it is acknowledged that there are concerns that the regionalisation of ICrimJ may have a negative impact on the ICC and the growth of

trafficking in persons; trafficking in hazardous wastes; illicit exploitation of natural resources; the crime of aggression; and inchoate offences.

¹²³ Chacha Murungu, “Towards a Criminal Chamber in the African Court of Justice and Human Rights”, *Journal of International Criminal Justice* 9 (2011): 1067-1088, at 1068.

¹²⁴ Max du Plessis, “Implications of the AU decision to give the African Court jurisdiction over international crimes”, *Institute for Security Studies Paper* 235, June 2012, at 3.

¹²⁵ See AU Decision Ext/Assembly/AU/Dec.1 (Oct.2013), *supra* n.88.

¹²⁶ This may be done by strengthening or rebuilding the domestic judicial system, and by providing international assistance. See ICC OTP, *supra* n.100.

¹²⁷ Several scholars add that careful thought would also have to be given to how domestic legislation would enable a relationship with regional courts, particularly on the issues of mutual legal assistance and extradition. Max du Plessis, Tiyanjana Maluwa and Annie O’Reilly, “Africa and the International Criminal Court” (July 2013), at www.chathamhouse.org/sites/default/files/public/Research/International%20Law/0713pp_iccafrica.pdf.

ICL, particularly if permanent regional courts are established.¹²⁸ For example, Rauxloh claims the development of ICL would be undermined by regional criminal courts because they: (1) divert cases from the ICC, thereby reducing opportunities for the Court to adjudicate and create case law; (2) lead to different versions of ICL, where certain atrocities become the concern of specific regions rather than the international community as a whole; and (3) fragment ICL case law, and result in inconsistency and an incoherent set of standards and practices.¹²⁹ These claims will be dealt with in turn, however it is important to firstly note that concerns about the potential negative impact of regional arrangements on international relations and law have existed since the first attempts at creating universal international institutions.¹³⁰ These fears are based on the belief that regional approaches will fragment the rules and principles of international law and result in differing applications and standards, thereby leading to an overall weakening of the universal system and potentially giving rise to conflict among different regional groups.¹³¹ Attempts to promote regional approaches to human rights protection, for example, were therefore not supported during the drafting of the UN Charter.¹³² On Rauxloh's first claim, associated concerns are that regional arrangements will then create jurisdictional overlaps and issues of finality with judgments.¹³³ However, given that the ICC not only allows but helps national courts to hear cases, such fears and the objections that regional courts will

¹²⁸ A number of substantive issues arising from the proliferation of international courts and tribunals have been identified to potentially lead to negative consequences. A broad discussion on the proliferation of international courts and tribunals is available at *New York University Journal of International Law and Politics* 31(4) (1999). See also Jonathan Charney, *Is International Law Threatened by Multiple International Tribunals?*, *Recueil des Cours* 271 (1998):101-382.

¹²⁹ Regina Rauxloh, "Regionalisation of the International Criminal Court", *New Zealand Yearbook of International Law* 4 (2007):67-84.

¹³⁰ See discussion in Chapter 1 on how regional arrangements currently fit into the wider institutional and normative structure of international system.

¹³¹ The lack of attention in international law to regionalism was thus noted in the International Law Commission's study on fragmentation in international law, See ILC, *Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN doc.A/CN.4/L.676, 29 July 2005; and ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi*, UN doc.A/CN.4/L.682, 13 April 2006.

¹³² See Burns Weston, Robin Lukes and Kelly Hnan, "Regional Human Rights Regimes: A Comparison and Appraisal", *Vanderbilt Journal of Transnational Law* 20 (1987):585-637; and Karel Vasak, "Introduction", in Karel Vasak, ed., *The International Dimensions of Human Rights* (Connecticut: Greenwood Press, 1982).

¹³³ See Markus Benzing and Morten Bergsmo, "Some Tentative Remarks on the Relationship between International Criminal Jurisdictions and the International Criminal Court", in Cesare Romano, André Nollkaemper and Jenn Kleffner, eds., *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford: Oxford University Press, 2004), at 410-411; and Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford: Oxford University Press, 2004), at 8-11.

steal opportunities from the ICC are hard to justify. Then-Prosecutor, Luis Moreno-Ocampo, in fact stated that “(t)he efficiency of the International Criminal Court should not be measured by the number of cases that reach the court or by the content of its decisions”.¹³⁴ He further acknowledged that the absence of trials before the ICC, due to the proper and regular functioning of other judicial institutions, “would be a major success”.¹³⁵ Envisioned only as an alternative avenue, regional mechanisms should similarly not be seen as preventing national courts from exercising their right to hear cases and contribute to the development of ICL. In this connection, it is therefore critical to ensure that the various institutional arrangements in the international system are engaged with each other, interdependent and mutually supportive.¹³⁶

On Rauxloh’s second claim, the issue is both a matter of substantive jurisprudence and a question of timing the pursuit of prosecutions and/or alternative means of justice.¹³⁷ It could be argued that there should be different sets of crimes and punishments because of the vastly different circumstances faced in different regions of the world.¹³⁸ Since the underlying objectives of criminal law¹³⁹ may differ according to the varied political backgrounds, legal traditions and social customs of countries in different regions, it is hard to justify the existence of only one interpretation of substantive criminal law and procedure.¹⁴⁰ This has added relevance with regards to international crimes as the pursuit of justice is also too often conflated with the quest for peace in conflict situations. Dissimilarities in focus and approach across systems should therefore not be seen to immediately imply injustice and impunity.¹⁴¹ Rather, the key measure should be that international crimes are adequately addressed and

¹³⁴ ICC Press Release, “Election of the Prosecutor, Statement by Mr. Moreno Ocampo”, ICC-OTP-20030502-10, Assembly of States Parties to the Rome Statute of the ICC, New York, 22 April 2003.

¹³⁵ *Ibid.*

¹³⁶ William Burke-White, “A Community of Courts: Towards a System of International Criminal Law”, *Michigan Journal of International Law* 24 (2002):1-101, at 75-6.

¹³⁷ See discussion in Chapter 4 on the appropriate form(s) of a regional approach to upholding ICrimJ.

¹³⁸ As contended in Chapter 1, by ignoring the potential benefits of regional variations in advancing ICrimJ, the development of ICL will unavoidably and unfortunately be restricted to one set of formal procedures and laws that are rooted in Western legal tradition.

¹³⁹ See discussion in Chapter 4.

¹⁴⁰ Greenawalt similarly argues that as long as domestic legal systems have different views on the nature and consequences of criminality, “the introduction of a distinctly international criminal law will inevitably perpetuate or foster unequal treatment of one form or another”. See Alexander Greenawalt, “The Pluralism of International Criminal Law”, *Indiana Law Journal* 86 (2011):1063-1130.

¹⁴¹ Diverging views associated with a multiplicity of judicial institutions are commonly argued to undermine the law by allowing States to disregard unfavourable opinions and competing obligation, as well as permit exploitation by individuals to avoid conviction. William Burke-White, “Regionalisation of International Criminal Law Enforcement: A Preliminary Exploration”, *Texas International Law Journal* 38 (2003): 729-761, at 756-7.

offenders are appropriately dealt with. It is not denied that the establishment of more international criminal courts and tribunals may result in further complexity and additional issues to tackle. Pocar however points out that unity of jurisdiction is not the priority in combating international crime, and concerns about substantive case law and divergent interpretations can be effectively managed by ensuring that regional courts take existing tribunals into account.¹⁴² Hence, it is less important whether ICrimJ is upheld under international, regional or national jurisdiction.¹⁴³ The more crucial point is to coordinate and align the various levels of activity to ensure that the goals of ICrimJ are achieved in a consistent, efficient and effective way. On Rauxloh's third claim, it should be recalled that a primary aim of ICrimJ has been to punish individual perpetrators and deter others from committing egregious international crimes. It is not to ensure uniformity in ICL, let alone ensure that the ICC directs its development. As such, there should not be a debilitating concern that regional bodies may interpret ICL in a way that does not correspond with the ICC. More importantly, regional arrangements will not be undermining the development of ICrimJ if they are able to protect and maintain peace and security, as well as sanction and ultimately protect peoples against atrocities. Regarding the fear that differing regional interpretations and standards of justice will bring into question the objectivity and credibility of ICL, it could be said that any domestic or *ad hoc* international court could equally lead to a fragmentation of ICL.¹⁴⁴ A better view may thus be that ICL is being strengthened by and transformed into a "pluralist system".¹⁴⁵

Experience has indeed demonstrated that universal and regional approaches to international law are compatible, and the increased attention and coverage strengthens the international system.¹⁴⁶ For example, the regional arrangements established for the

¹⁴² Fausto Pocar, "The Proliferation of International Courts and Tribunals: A Necessity in the Current International Community", *Journal of International Criminal Justice* 2 (2004):304-308, at 307.

¹⁴³ It is however recognised that regional States close to the crimes will be more affected and eager to act, and are less likely to face language and cultural barriers compared to the ICC.

¹⁴⁴ For example, the judgements of the ICTY and ICTR not only highlighted that divergent case law could result despite having similar statutes. It also revealed the difficulties of insisting on identical standards and practices for distinct situations in diverse countries within different regions. For example, van Sliedregt notes that the different opinions held by the ICJ and the ICTY over the 'overall control-test' led to much concern about the possible fragmentation of ICL. See Elies van Sliedregt, "Pluralism in International Criminal Law", *Leiden Journal of International Law* 25 (2012):847-855.

¹⁴⁵ It is possible to maintain unity in issuing judgements or developing rules and procedures, while also allowing room for legitimate differences if the international legal system is viewed as pluralist. See William Burke-White, "International Legal Pluralism", *Michigan Journal of International Law* 25 (2003):963-979.

¹⁴⁶ See *A More Secure World: Our Shared Responsibility - Report of the High-level Panel on Threats, Challenges and Change*, UN doc.A/59/565. 2 December 2004; and Louise Fawcett, "The Evolving

promotion and protection of human rights clearly do not undermine the universal system,¹⁴⁷ and have in fact all situated themselves within the universal system through an expressed commitment to the UDHR.¹⁴⁸ Moreover, regional bodies have been able to foster agreement in Europe and the Americas to create institutionalised mechanisms to realise human rights norms ahead of the UN,¹⁴⁹ as well as develop international human rights law in areas where substantive agreement has yet to be achieved at the universal level.¹⁵⁰ Hence, it is clear that regional arrangements can effectively balance between adhering to universal norms and goals, and responding to the differing needs and practices in various parts of the world.¹⁵¹ It is then not inconceivable for the regionalisation of ICrimJ to similarly be viewed as a way to ensure that the ICL is appropriately enforced according to the situational needs of the regions concerned.¹⁵²

In sum, diversity within the international system does not entail conflict between universal and regional perspectives, or the fragmentation of international law. Greater attention on regional arrangements should instead be given to take into account unique regional conditions and considerations, thereby ensuring compatibility between universal and regional approaches. Given that ICrimJ is still in the nascent stages of development, the opportunity exists to allow regional mechanisms to be integrated into the system effectively and ensure that activities are coordinated with the ICC. This would assist in alleviating any lingering concerns about the fragmentation of ICL and inconsistency in its enforcement.

Architecture of Regionalization”, in Michael Pugh and Waheguru Sidhu, eds., *The United Nations and Regional Security: Europe and Beyond*. (Boulder: Lynne Rienner Publishers, 2003).

¹⁴⁷ The 1993 Vienna Declaration and Programme of Action thus recognised that regional arrangements “play a fundamental role in promoting and protecting human rights” and “should reinforce universal human rights standards, as contained in international human rights instruments, and their protection”. See *UN World Conference on Human Rights, Vienna Declaration and Programme of Action*, A/CONF.157/23, 12 July 1993, at para 37.

¹⁴⁸ For example, the European Convention on Human Rights explicitly states that the regional instrument is a step towards the collective enforcement of the rights stated in the UDHR.

¹⁴⁹ See Richard Burchill, “The Role of Democracy in the Protection of Human Rights – Lessons from the European and Inter-American Human Rights Systems”, in David Forsythe and Patrice McMahon, eds., *Human Rights and Diversity: Area Studies Revisited* (Lincoln: University of Nebraska Press, 2003); Enzo Cannizzaro, ed., *The European Union as an Actor in International Relations* (The Hague: Kluwer Law International, 2002); and Martti Koskenniemi, ed., *International Law Aspects of the European Union* (The Hague: Kluwer Law International, 1998).

¹⁵⁰ For example, the only international legal instrument on minority rights, *Framework Convention for the Protection of National Minorities*, was adopted by the Council of Europe. See *Framework Convention for the Protection of National Minorities*, ETS No 157, 1 February 1995.

¹⁵¹ See Weston, *supra* n.132, at 588.

¹⁵² For a discussion, see Richard Burchill, “International Criminal Tribunals at the Regional Level: Lessons from International Human Rights Law”, *New Zealand Yearbook of International Law* 4 (2007):25-44.

2.3 Theoretical Basis for Regionalism and Practical Acceptance by States

Given that the modern ICrimJ system continues to be controlled by sovereign States, regionalisation efforts must appeal to these self-interested entities. This section thus examines the theoretical basis for regionalism from the perspective of both neo-liberal institutionalism and neo-realism, and highlights that State acceptance will exist regardless of which IR lens is used to explain the rationale for and viability of regional initiatives. This will then set the stage for the subsequent analysis of ASEAN and its member States, which hold firmly to the notions of state sovereignty and non-intervention in the domestic affairs of another State. Identifying a suitable theoretical lens to understand inter-State relations will not only help in assessing the feasibility of regionalising ICrimJ in Southeast Asia, but also in ascertaining the most practical and acceptable mechanism(s) in this politically, economically and culturally diverse region.

2.3.1 Neo-liberal Institutionalism

Neo-liberal institutionalism is an international relations theory that analyses the factors behind the sources of and constraints on cooperation between States,¹⁵³ and examines how cooperative behaviour results from functional benefits provided by institutions and associated rules.¹⁵⁴ It argues that increasing levels of interdependence between States generate greater ‘demand’ for cooperation to solve various collective action problems.¹⁵⁵ In this regard, institutions essentially proffer solutions to coordination problems by providing information that aids decision making and reduces transaction costs, as well as by making State commitments more credible by specifying what is expected, thereby also encouraging State compliance.¹⁵⁶

¹⁵³ These factors include State interests and preferences, as well as power structures. Its focus is thus “neither as broad as international structure, nor as narrow as the study of formal organizations”. Stephan Haggard and Beth Simmons, “Theories of International Regimes”, *International Organizations* 41 (1987): 491-517, at 492.

¹⁵⁴ Robert Keohane, *International Institutions and State Power* (Boulder: Westview, 1989); Robert Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton: Princeton University Press, 1984); David Baldwin, ed., *Neorealism and Neoliberalism* (New York: Columbia University Press, 1993).

¹⁵⁵ Robert Keohane, “Institutional Theory and the Realist Challenge After the Cold War”, in David Baldwin, ed., *Neorealism and Neoliberalism: The Contemporary Debate* (New York: Columbia University Press, 1993), at 274.

¹⁵⁶ See Robert Keohane and Lisa Martin, “The Promise of Institutional Theory”, *International Security* 20 (1995): 39-51.

From the perspective of neo-liberal institutionalism, regional initiatives depend on evolving inter-governmental bargains, and State support for such initiatives is then based on the following core suppositions. Firstly, increasing (economic, social, environmental, etc.) interdependence generates a growing need for cooperation. Regional cohesion thus emerges from how individual or issue-specific collaboration become part of a network, where each new initiative becomes embedded in a larger and more complex relationship between States.¹⁵⁷ Secondly, States are the primary actors and will be incentivised to cooperate in their own interests for achieve absolute gain.¹⁵⁸ In this connection, successful collaborative management of common problems like an international crime is argued to strengthen the individual States. Thirdly, institutions offer States benefits that cannot be unilaterally obtained. These include: (1) providing information for decision making and a framework for interactions; (2) facilitating transparency and monitoring; (3) reducing transaction and verification costs for consensus, especially among large numbers of States; and (4) making it easier to punish defections.¹⁵⁹ To stabilise their relations and instil orderly processes regarding ICrimJ, States may therefore consider establishing or joining formal institutions, such as a regional court.

Neo-liberal institutionalism posits that States will cooperate if it produces absolute (not exclusive relative) gains. As such, the more that regional collaboration serves State interests, the greater is its legitimacy and the support it receives.¹⁶⁰ The political regionalism within Southeast Asia already reflects the need for and supports the focus on managing growing interdependence in all spheres of international relations from trade and economics to security and defence.¹⁶¹ The issue is therefore

¹⁵⁷ The degree of institutionalisation, evidenced by formal procedures and structures that regulate and facilitate the functioning of the region, will depend on the nature of the regional initiative. Rick Fawn, “‘Regions’ and their Study: Wherefrom, What for and Whereto?”, *Review of International Studies* 35 (2009): 5–34, at 19.

¹⁵⁸ Being heavily statist, institutionalism is concerned by how States, which are viewed as rational egoists can be led to cooperate. It however accepts that other non-State actors – like international organisations and nongovernmental organisations – may affect State behaviour and objectives. See Robert Axelrod, *The Evolution of Cooperation* (New York: Basic Books, 1984), at 3; and Robert Axelrod and Robert Keohane, “Achieving Cooperation under Anarchy: Strategies and Institutions”, *World Politics* 38 (1985): 226-54, at 226.

¹⁵⁹ See Axelrod (1984), *supra* n.158, at 97; and Axelrod (1985), *supra* n.158, at 250.

¹⁶⁰ Alternatively, if cooperation is found to undermine or challenge State interest and power, as the ICC is perceived by some to do, the support received may be lacking, decrease or even cease. The official criticism, opposition and defection by the AU and various African States then clearly highlight the emerging anti-ICC sentiment held within the region.

¹⁶¹ For example, the ASEAN Regional Forum (ARF) was established and will be sustained because of both the tangible and intangible benefits provided: facilitating communication, information, and transparency; as well as reducing mutual threat perceptions and worst-case thinking.

not whether ASEAN States should move closer together on ICrimJ issues, but whether it should be formalised or institutionalised within the regional framework that currently manages the complicated interactions and interdependencies between Southeast Asian countries.¹⁶² That said, a point to note is that the existence, or alternatively absence, of formalised arrangements do not reflect the success of a regional approach or its acceptance by States.¹⁶³ Indeed, there are formalised regional bodies, like the Organisation of American States (OAS), that have “historically sustained themselves through their inaction”.¹⁶⁴ Africa has also created many such “bureaucratically laden entities”,¹⁶⁵ but they are generally considered ineffective due to a lack of resources. On the other hand, there are non-institutionalised but effective regional groupings that even have regular summits of Heads of State and ministers with annual agendas.¹⁶⁶

Separately, some regional institutions may have been created, despite official rhetoric otherwise, to reinforce state sovereignty rather than to modify or transcend it.¹⁶⁷ This appears to be the case for ASEAN, both before and after the organisation became a legal personality through the ratification of its Charter.¹⁶⁸ It explains the experience in Southeast Asia, where ASEAN States have not only negotiated FTAs as a regional bloc and jointly worked to address transnational issues and crimes, but also undertaken to create an ASEAN Economic Community (AEC) by 2015. Neo-liberal institutionalism thus not only explains and justifies why regionalisation occurs, but may also a useful lens to gauge the possibility of regionalising ICrimJ in Southeast Asia. The question is then whether another perspective better matches the experience

¹⁶² This bears much relevance for the regionalisation of ICrimJ due to the complex relationship between peace and justice, as well as for determining whether formal prosecutions or informal mechanisms may be preferred in different regional settings. See discussion in Chapter 4.

¹⁶³ Acharya and Johnstone contend that “more formally institutionalised regional groups do not necessarily produce more effective cooperation”. Amitav Acharya and Alastair Johnston, “Conclusion”, in Amitav Acharya and Alastair Johnston, eds., *Crafting Cooperation: Regional International Institutions in Comparative Perspective* (Cambridge: Cambridge University Press, 2007), at 268.

¹⁶⁴ Brian Job, “Matters of Multilateralism: Implications for Regional Conflict Management”, in David Lake and Patrick Morgan, eds., *Regional Orders: Building Security in a New World* (University Park: Pennsylvania State University Press, 1997), at 182.

¹⁶⁵ James Mittelman, *The Globalization Syndrome: Transformation and Resistance*, (Princeton: Princeton University Press, 2000), p. 118.

¹⁶⁶ The Visegrád Group in Central Europe has been argued to function well precisely because of the lack of institutionalisation. See Rick Fawn, “The Elusive Defined? Visegrád Co-operation as the Contemporary Contours of Central Europe”, *Geopolitics* 6 (2001): 47–68.

¹⁶⁷ See Michael Barnett and Etel Solingen, “Designed to Fail or Failure of Design? The Origins and Legacy of the Arab League”, in Amitav Acharya and Alastair Johnston, eds., *Crafting Cooperation: Regional International Institutions in Comparative Perspective* (Cambridge: Cambridge University Press, 2007).

¹⁶⁸ See discussion in Chapter 3.

of ASEAN and should be used to assess how ICrimJ can be advanced through regional arrangements.

2.3.2 Neo-Realism

Neo-realists understand a 'region' in the context of the broader international system, and focuses on the dynamics of inter-State rivalry and international *realpolitik*.¹⁶⁹ States are understood as rational, self-seeking units that will cooperate for self-interest, particularly in terms of their survival and security.¹⁷⁰ These sovereign entities are primary actors in the anarchic international system due to the absence of a global government. Regions are then formed as a response to external threats and challenges,¹⁷¹ with little substantive distinction existing between regional political and economic initiatives.¹⁷² Although neo-realists acknowledge the growing degree of economic interdependence, sovereignty is paramount and it will always check and balance any cooperative project.¹⁷³ Hence, possibilities for cooperation exist but are constrained by the exigencies of State power and interest,¹⁷⁴ as well as the systemic factors that lead to bandwagoning by States and balance-of-power politics.¹⁷⁵

Several explanations for regional initiatives of both developing and developed countries are provided by neo-realism. Firstly, regional initiatives may emerge as a response to a hegemonic power or overwhelmingly dominant State. Such groups are

¹⁶⁹ The core difference between traditional realism and neorealism is the latter's emphasis on the structure of the international system for explaining global politics. Also called structural realism, it argues that the system's structure is determined by the absence of overarching authority and the distribution of power among States.

¹⁷⁰ The relative military and economic power of the State then defines its ability to maintain both its independence and domestic order.

¹⁷¹ The politics of regionalism and emergence of regional alignments thus have much in common with the politics of alliance building. See Stephen Walt, *The Origins of Alliances* (Ithaca: Cornell University Press, 1987).

¹⁷² See Andrew Hurrell, "Explaining the resurgence of regionalism in world politics", *Review of International Studies* 21 (1995): 331-358, at 340.

¹⁷³ Waltz posits that even large absolute gains will not elicit cooperation as long as parties fear how the other will use its increased capabilities. Fawcett notes this is especially true if sovereignty is fragile. See Kenneth Waltz, *Theory of International Politics* (Reading: Addison-Wesley, 1979), at 105; and Louise Fawcett, "Exploring Regional Domains: A Comparative History of Regionalism", *International Affairs* 80 (2004): 429-446, at 444.

¹⁷⁴ States will thus agree to a collective that is beneficial in relative terms, but will defect once it no longer serves its purpose. This is akin to the Vattellian notion of international society dictated by State interests. See Benedict Kingsbury, "Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law", 13 *European Journal of International Law* (2002):401-436.

¹⁷⁵ Balance-of-power politics emerge from the confrontation between States, and is generally regarded as a primary tool for States to create equilibrium within the anarchic international system.

seen as a natural response of weaker States trapped in a world dictated by the powerful. Indeed, much of the regionalist activity through the Cold War years involved schemes for cooperation designed to improve a region's position in the international system, either by increasing its bargaining strengths or by attempting to seal off the region and reduce the scope for outside intervention.¹⁷⁶ This decidedly applies to Southeast Asia.

Secondly, regionalism may by extension arise as an attempt to restrict the exercise of external hegemonic power by creating regional institutions. In this regard, it is noteworthy that ASEAN was partly formed as a means to block the spread of communism within the founding member States. It is however also acknowledged that regional arrangements established by smaller States are likely to be contingent upon the policies and attitudes of the stronger State(s), which will ultimately favour initiatives that reinforced their own positions and oppose those that went against their interests. ASEAN has then sought to address this problem with the need for consensus, which has become an organisational norm.¹⁷⁷

Thirdly, regional cohesion may alternatively be the result of sustained convergence of material interests and incentives provided by working with the regional hegemon. There are indeed reasons and a tendency for weaker states to seek regional accommodation with a local hegemon in hopes of bandwagoning.¹⁷⁸ Even when it may not be in their overall best interests, Gruber highlights that States may join the bandwagon to avoid being left behind.¹⁷⁹ This is evidenced by the shared belief amongst the Southeast Asian countries in the common ASEAN saying that 'a rising tide will float all boats'. In this regard, some States may believe that not participating in certain regional initiatives is neither a rational choice nor a real option available to them.

¹⁷⁶ Third World structuralists were for example "interested in regionalism as a tool in the struggle to end the exploitative and dependent relationship" between developing and industrialized countries. Louise Fawcett, "Regionalism in Historical Perspective", in Louise Fawcett and Andrew Hurrell, eds., *Regionalism in World Politics: Regional Organization and International Order* (Oxford: Oxford University Press, 1995), at 15.

¹⁷⁷ See discussion on the 'ASEAN way' in Chapter 4.

¹⁷⁸ For example, there are incentives to form alliances with an economically more powerful State that might provide scarce resources, which may help political leaders resolve internal economic and political problems. Jack Levy and Michael Barnett, "Alliance Formation, Domestic Political Economy, and Third World Security", *Jerusalem Journal of International Relations* 14 (1992): 19-40, at 23.

¹⁷⁹ Lloyd Gruber, *Ruling the World: Power, Politics and the Rise of Supranational Institutions* (Stanford: Stanford University Press, 2000).

Lastly, hegemons on the other hand may promote commitment to regional bodies in order to direct or limit the freedom of action of both the organisation and its other member States.¹⁸⁰ Regional initiatives are then tools to serve the interests of the most powerful State(s), which is typically instrumental in its creation and maintenance and sets its agenda.¹⁸¹ For example, Fawcett points out that European integration can be understood in the light of the geopolitical framework during the Cold War and the US hegemony that embedded European integration within a transatlantic security framework,¹⁸² and that all regional activity in the Americas is predicated on the dominant role of the US.¹⁸³ Allison similarly contends that institution-building in Central Asia also has much to do with balancing or bandwagoning with the regional power(s).¹⁸⁴ ECOWAS may then be possibly linked to support of Nigeria, while the OIC can largely be regarded as an initiative of Saudi Arabia.

Neo-realism has often been criticised for grossly oversimplifying the nature of the international system and neglecting changes to the global system, in particular growing economic interdependence. Lipson however notes that while economic matters can be discussed according to absolute gains, other issues like security are best discussed in relative gains.¹⁸⁵ In this vein, neo-realists counter that as ‘positional’ actors, States are motivated by the maintenance or enhancement of their position *vis-a-vis* other States to ensure their survival,¹⁸⁶ and not merely trying to maximise their absolute gains. As international bodies like the ICC are unable to address the anarchy in the system, they are merely tools of States in their competition with each other. Support for ICrimJ will therefore not be motivated by the ‘conscience of humanity’ or altruistic considerations, and the sacrifice of State sovereignty to enforce ICL would make little sense unless doing so confers some relative advantage or to opposing it

¹⁸⁰ Regionalism provides a veneer of respectability and legitimacy, but may be an instrument for the assertion of hegemonic control. James Mittelman and Richard Falk, “Hegemony: The Relevance of Regionalism?”, in Bjørn Hettne, András Inotai and Osvaldo Sunkel, eds., *National Perspectives on New Regionalism in the North* (London: Macmillan, 1999), at 175.

¹⁸¹ Hegemons create and shape institutions in order to maintain or even increase their share of world power. John Mearsheimer, “The False Promise of International Institutions”, *International Security* 19 (1994/95): 5-49, at 13.

¹⁸² Fawcett, *supra* n.173, at 444.

¹⁸³ Fawcett, *supra* n.176, at 13.

¹⁸⁴ This often refers to Russia, but may also refer to China, Turkey, or Iran. Roy Allison, “Regionalism, Regional Structures and Security Management in Central Asia”, *International Affairs* 80 (2004): 463-483.

¹⁸⁵ See Charles Lipson, “International Cooperation in Economic and Security Affairs”, *World Politics* 37 (1984): 1-23, at 15-18.

¹⁸⁶ Robert Beck, Anthony Arend, and Robert Vander Lugt, “Structural Realism”, in Robert Beck, Anthony Arend, and Robert Vander Lugt, eds., *International Rules: Approaches from international Law and International Relations* (Oxford: Oxford University Press, 1996), at 145.

entails some relative costs.¹⁸⁷ This partly explains the tortured development of ICL and a permanent international criminal court, as well as the continued desire of States “to limit the Court's powers (to retain their own freedoms)”.¹⁸⁸

Neo-realism can therefore both explain the presence of regionalism and justify its acceptance self-interested sovereign States, which probably best describes the Vattellian political realities in Southeast Asia. Although it may be said that upholding ICrimJ reflects an international community that resembles the neo-Grotian notion of a society of States,¹⁸⁹ the pluralist and statist hallmarks of the Vattellian archetype cannot be ignored. States will attempt to push others to abide by their position on the law, but will oppose or ignore legal norms and practices that they disfavour.¹⁹⁰ As noted earlier in this chapter, such behaviour is evident when the enforcement of ICL challenges state sovereignty. A neo-realist lens may therefore be most likely to produce an accurate assessment of how ICrimJ can be best advanced through regional arrangements amongst ASEAN countries.

In sum, the rationale for and viability of regional initiatives exists regardless of whether neo-liberal institutionalism or neo-realism is favoured. That said, given that AMS hold firmly to the notions of state sovereignty and non-intervention in the domestic affairs of another State, a neo-realist lens may help identify the most practical and acceptable mechanism(s) for regionalising ICrimJ in Southeast Asia. It is however worth noting that other theoretical lenses have also been used in the ASEAN context, particularly constructivism. For example, Acharya argues that ASEAN's security community is a “social construct” where norms and collective identity are the main driving forces.¹⁹¹ Fundamental to his argument is the notion of ‘incremental socialization’, whereby ASEAN's norms and identity develop from a long-term

¹⁸⁷ Boister notes that “State parties are not likely to let the ICC slip its Westphalian moorings” because it could threaten the existing international order. He acknowledges that resistance to the ICC may also suggest that consensus on common values has not yet been achieved amongst the entire community of States. Neil Boister, “Transnational Criminal Law?”, *European Journal of International Law* 14 (2003):953-976, at 971.

¹⁸⁸ Schiff, *supra* n.1, at 6.

¹⁸⁹ The neo-Grotian notion of international law is based on a society of States, which Lauterpacht opines then augurs cooperation amongst States and common institutions, based on their shared interests and values. See Hersch Lauterpacht, ‘The Grotian Tradition in International Law’, 23 *British Yearbook of International Law* (1946):1-56.

¹⁹⁰ Weaker States will similarly push for laws that will constrain the hegemon or stronger States, but are likely to abandon them should defection become more beneficial.

¹⁹¹ Acharya contends that the ultimate goal of ASEAN is the creation of a “pluralistic security community” in Southeast Asia. Amitav Acharya, “Regional Military-Security Cooperation in the Third World: A Conceptual Analysis of the Relevance and Limitations of ASEAN”, *Journal of Peace Research* 29 (1992):7-21, at 12

process of interaction and adjustment.¹⁹² That said, the ‘ASEAN way’¹⁹³ of making decisions through consensus after extensive consultations is ultimately a practice of inter-State relations. Moreover, ASEAN norms like the primacy of sovereignty, non-use of force, and non-interference in the internal affairs of other States are principles developed by AMS based on strict reciprocity. Hence, the state-centric IR theories of neo-realism and neo-liberalism still underpin ASEAN’s regionalization. Indeed, while Acharya argues that regionalism in Southeast Asia is “indigenously constructed rather than exogenously determined”,¹⁹⁴ he recognises that ASEAN States were also brought together by perceived common external threats. Acharya also admits that the norms and values adopted by AMS are not vastly different, and that the distinguishing factor is “the process through which such interactions are carried out”, which contrasts with the “adversarial posturing” and “legalistic decision-making procedures” often found in other international and regional settings.¹⁹⁵ As such, even if constructivism is accepted in the ASEAN context, it is not necessarily antagonistic to the neorealist and neoliberal theories employed in this research.

2.4 Conclusion

Geography is the necessary starting point for identifying a ‘region’, with shared identity and interests amongst States as the basis for regionalism. However, the rationale for a regional initiative can then be explained by the considerations of self-interested States based on neo-realist systemic or neo-liberal interdependence theories. The proposal of regionalising ICrimJ, broadly understood as the process or strategy of devolving the power and responsibility of enforcing ICL to the regional level, is therefore theoretically sound from all these perspectives and implicitly acceptable to States.

Regardless of the theoretical lens used, it is nevertheless clear that for a regional ICrimJ initiative to succeed, States must find that the benefits of action

¹⁹² See Amitav Acharya, *Constructing a Security Community in Southeast Asia* (London: Routledge, 2001), at 71-72..

¹⁹³ See Amitav Acharya, “Collective Identity and Conflict Management in Southeast Asia”, in Emanuel Adler and Michael Barnett, eds., *Security Communities* (Cambridge: Cambridge University Press, 1998), at 211-121; and Mely Caballero-Anthony, *Regional Security in Southeast Asia: Beyond the ASEAN Way* (Singapore: Institute of Southeast Asian Studies, 2005), at 72-76.

¹⁹⁴ Amitav Acharya, *The Quest for Identity: International Relations of Southeast Asia* (Singapore: Oxford University Press, 2000), at 166.

¹⁹⁵ Amitav Acharya, “Ideas, Identity, and Institution Building from the ‘ASEAN Way’ to the ‘Asia-Pacific Way?’”, *The Pacific Review* 10 (1997): 319-346, at 329.

outweigh the costs of inaction. The hitherto absence of regional approaches for ICL must then not be confused with any misconceptions that they are not viable or beneficial; or that regional views on ICrimJ are irrelevant or non-existent. Firstly, States are generally reluctant to relinquish sovereignty and redistribute their power. They will readily do so only if such a move is both compatible with their own interests and bolstered by a permissive international environment. In this regard, the confluence of egregious atrocities, shared political will, and accommodating global circumstances led the international community to establish the ICC in 1998. The conditions that will be supportive of a regional ICrimJ approach in Southeast Asia will be discussed in Chapter 4. At this point, it is suffice to note that there remains an underlying tension between the Court and the interests of sovereign States, and the regionalisation of ICrimJ can thus be pertinent and advantageous for States wishing to retain control over the prosecutions of its citizens yet not wanting to appear supportive of impunity for international crimes by undermining the ICC. Secondly, it should not be forgotten that regional positions were present at the Rome Conference,¹⁹⁶ and continue to be witnessed at the ICC Review Conference and Assembly of Member States (ASP) meetings. In this regard, the ICC may also benefit from the regionalisation of ICrimJ by recognising diversity within the international community, accommodating the variations in regional focus, and incorporating them into its work.

¹⁹⁶ For example, the Southern African Developmental Community (SADC) often spoke with a unified voice through the South African delegation, while the EU countries issued joint statements through the EU presidency, and the Arab and ASEAN groupings maintained a unified front on various issues. Even the non-governmental organisation Coalition for an International Criminal Court (CICC), which was given some credit for the success of the Rome conference, had recognised the need to divide itself into teams covering regional groupings (besides thematic areas and issue caucuses).

CHAPTER 3

LESSONS FROM OTHER BRANCHES OF INTERNATIONAL LAW

The main drivers of the pursuit of ICrimJ by State actors have been protecting peoples against egregious human rights violations by the sanctioning and deterring of atrocities, as well as the preservation of international peace and security through collective action. Indeed, a large part of the international approach after WWII was the development of ICL to meet the immediate post-war need of delivering justice and punishing war criminals, as well as to deter the future commission of genocide, war crimes, and crimes against humanity.¹ The principles behind ICrimJ and its enforcement were separately also linked to international security cooperation heralded by conflict management.² Hence, it may be said that enforcing ICrimJ can help ensure collective security³ and protect human rights norms, or even claimed that collective security law and human rights law are immediately applicable to ICL not just by way of analogy.⁴

¹ Peace operations reflect that the protection and promotion of human rights undoubtedly remain important to the international community. Nigel White, “Peace Operations”, in Vincent Chetail, ed., *Post Conflict Peacebuilding: A Lexicon*, (Oxford: Oxford University Press, 2009), at 219.

² Doswald-Beck thus defines an international crime as a breach of international law that is “perceived as a threat to peace and security, and a lack of accountability for such crimes frequently prevents a lasting peace”. Louise Doswald-Beck, “International Crimes”, in Chetail, *supra* n.1, at 158.

³ Collective security can be generally defined as any action by a group of States intended to avoid or resolve situations that jeopardise the peace and security, as well as address threats to or breaches of the peace. It is based on the fundamental perception by States that peace and security are indivisible, and that all threats and breaches of the peace are detrimental to their national interests regardless of direct involvement in the conflict. For a discussion, see Hans Kelsen, “Collective Security and Collective Self Defence under the Charter of the United Nations”, *American Journal of International Law* 42 (1948): 783-796; Thomas Weiss, *Collective Security in a Changing World* (Colorado: Lynne Rienner Publishers, 1993); George Downs, ed., *Collective Security Beyond the Cold War* (Michigan: University of Michigan Press, 1994); Martti Koskenniemi, “The Place of Law in Collective Security”, *Michigan Journal of International Law* 17 (1996): 455-490; and Thomas Weiss, *Beyond UN Subcontracting: Task-Sharing with Regional Security Arrangements and Service-Providing NGOs* (London: Macmillan Press Ltd, 1998).

⁴ This argument that lessons from collective security and human rights law is relevant to ICrimJ and ICL is developed within this Chapter. At this juncture, it is worthy to note that that the Inter-American Commission of Human Rights in the *Coard* case highlighted the existence of “an integral linkage between the law of human rights and humanitarian law because they share a common nucleus of non-derogable rights and a common purpose of protecting human life and dignity”. The Inter-American Court of Human Rights in the *Velásquez Rodríguez v. Honduras* case earlier also held that all States have certain fundamental obligations in the area of human rights. See *Coard v. United States of America*, Case 10.951, Inter-American Commission of Human Rights, OEA/ser.L/V/II.106, doc.3rev. (1999), para.39; and *Velásquez Rodríguez v. Honduras*, Inter-American Court of Human Rights, Judgment of 29 July 1988, Series C No. 4.

Acknowledging these points is important for the discussion on upholding ICrimJ in Southeast Asia through a regional construct for two reasons. Firstly, the Association of Southeast Asian Nations (ASEAN) is best understood as a regional collective security organisation and confidence building mechanism that aids conflict avoidance and dispute management.⁵ As such, its mandate to maintain regional peace and security can arguably be extended to also cover ICrimJ-related issues. Secondly, the recent creation of the ASEAN Intergovernmental Commission on Human Rights (AICHR) offers direct and crucial lessons for the development of a ICrimJ mechanism or body within the region. The possibility of regionalising ICrimJ within Southeast Asia should therefore be assessed bearing in mind the rationale for ASEAN and its roles in maintaining regional peace through collective security and advancing human rights – aspects of inter-State relations that increasingly overlap with ICrimJ issues.

At this juncture, it is useful to recap how collective security law and human rights law may be linked to the upholding of ICrimJ and enforcement of ICL. A noteworthy development in the concept of collective security has been the linkage between threats to peace and stability and the commission of large-scale atrocities. Against the backdrop of the Rwandan tragedy and Kosovo dilemma, States recognised the importance of both the individual and collective responsibility of States to safeguard civilians from specific mass atrocity crimes, and endorsed the notion of a collective international responsibility to protect populations from avoidable calamity.⁶ With the creation of the ICTY and ICTR, as a non-military measure authorised under Chapter VII of the UN Charter to address threats to international peace and security,⁷

⁵ It is important to distinguish the notion of collective security that is being discussed from collective defence arrangements. Collective security refers to an organisation/initiative established by a group of States to: (1) promote peace through greater transparency, encouraging cooperation among member States, and socialising them to peaceful norms; and (2) deter or defeat any member State(s) that uses force to alter the status quo. Collective defence is typically directed against an enemy external to the group. See Paul Diehl, “Regional Conflict Management: Strategies, Necessary Conditions and Comparative Effectiveness”, in Paul Diehl and Joseph Leggold, eds., *Regional Conflict Management* (Oxford: Rowman and Littlefield Publishers, 2003); and Charles Kupchan, “The Case for Collective Security”, in Downs, *supra* n.3.

⁶ A report by the UN Secretary-General in 2005 then called on States to adopt the ‘responsibility to protect’. It emphasised that while States have the primary responsibility to protect its population, the responsibility shifts to the international community when a State is unable or unwilling to do so. In 2011, this ‘RtoP’ doctrine was first implicitly applied in relation to the massacres in Libya. See *In Larger Freedom: Towards Development, Security and Human Rights for All*, UN Doc. A/59/2005, 21 March 2005; and discussion later in this chapter.

⁷ UNSC resolutions 827 and 995 stated that the situations in the former Yugoslavia and Rwanda threatened international peace and security. The latter added that prosecuting perpetrators would contribute to national reconciliation, and the restoration and maintenance of peace. See UN Security Council resolution 827 of 25 May 1993, S/Res/827 (1993); and UN Security Council resolution 955 of 8 November 1994, S/Res/955 (1994).

the UNSC also unequivocally linked the notions of peace and justice.⁸ Ambiguity in the scope of collective security has however led to inconsistency in its application,⁹ and the increase in the number of acts that are perceived by States to breach or threaten peace and security.¹⁰

Collective security has then increasingly overlapped with ICrimJ issues concerning egregious international crimes and other gross violations of human rights previously caught by Article 2(7) of the UN Charter. This is partly due to the fact that situations once solely of domestic concern are now recognised and argued to have impact across national borders.¹¹ For example, an intra-State conflict may now be considered as a direct threat to peace and security, not least by spreading to neighbouring countries or leading to massive refugee flows across national borders.¹² In *Prosecutor v. Tadić (Jurisdiction)*, the ICTY supported this position and held that an internal armed conflict would constitute a ‘threat to the peace’ based on “the settled practice of the Security Council and the common understanding of the United Nations membership in general”.¹³ Foreign intervention has then been increasingly justified on the basis that the humanitarian crisis within the State constituted a threat to

⁸ The objective behind criminal courts in the UN system is thus “in support of the UN Security Council’s function of preserving and maintaining international peace and security”. Colin Warbrick, “The United Nations System: A Place for Criminal Courts?”, *Transnational Law and Contemporary Problems* 5 (1995): 237-261, at 260.

⁹ While terms like ‘breach of the peace’ are relatively clear, they may be applied selectively. Separately, terms like ‘threat to the peace’ is inherently ambiguous and allows for a significant amount of discretion. Nigel White, *Collective Security Law* (Aldershot: Ashgate Publishing, 2003), at xi.

¹⁰ Claude notes that collective security has been used “for virtually any and all multilateral activities” that statesmen or scholars regard as conducive to peace and order”. Inis Claude Jnr., *Swords into Plowshares: The Problems and Progress of International Organisation*, 4th ed. (New York: McGraw-Hill, 1984), at 247.

¹¹ John Murphy, “Force and Arms”, in Christopher Joyner, ed., *The United Nations and International Law* (Cambridge, Cambridge University Press, 1997), at 98.

¹² For example, the UNSC condemned “the repression of the Iraqi civilian population ... which led to a massive flow of refugees towards and across international frontiers and to cross-border incursions which threaten international peace and security in the region”. See UN Security Council resolution 688 of 5 April 1991.

¹³ The ICTY highlighted that the practice of the UNSC was “rich with cases of civil war or internal strife which it classified as a ‘threat to the peace’ and dealt with under Chapter VII, with the encouragement or even at the behest of the General Assembly”. Thus, there is a common understanding among the international community that “the ‘threat to the peace’ of Article 39 may include, as one of its species, internal armed conflicts”. See *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para.30.

international peace and security.¹⁴ There have also been calls for the right of humanitarian intervention by regional actors in internal conflicts,¹⁵ based on protecting civilians from genocide and large-scale crimes against humanity.¹⁶

Coupled with some relaxation of the principle of non-intervention, particularly amongst member States of some regional organisations, this then facilitated the emergence of the doctrine of Responsibility to Protect (RtoP).¹⁷ Officially carried in the Outcome Document of the 2005 UN World Summit, the doctrine builds on the notion of ‘sovereignty as responsibility’, and modifies the act of intervention from a controversial right to a hierarchy of responsibilities by individual States and the international community.¹⁸ In line with the view that large-scale atrocities committed within the borders of a State can also constitute threats to international peace and security, the international community has begun to operationalise RtoP.¹⁹ Delmas-Marty points out third states are thus “not limited to reactive measures, namely the prosecution and punishment of international crimes”, and there is a preventive aspect in their involvement.²⁰ In 2011, the doctrine was implicitly applied for the first time in

¹⁴ For example, the UNSC determined that “the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security”. See UN Security Council resolution 794 of 3 December 1992.

¹⁵ Some commentators argue that Article 53 of the UN Charter can be reinterpreted as permitting humanitarian or pro-democratic enforcement action by regional organisations without prior UNSC authorisation, especially since *ex post facto* approval may be sought. See Zsuzsanna Deen-Racsmany, “A Redistribution of Authority between the UN and Regional Organisations in the Field of the Maintenance of Peace and Security?”, *Leiden Journal of International Law* 13 (2000): 297-331; and Thomas Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge: Cambridge University Press, 2002), at 155.

¹⁶ See Jeremy Levitt, “Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone”, *Temple International and Comparative Law Journal* 12 (1998): 333-375.

¹⁷ The doctrine was adopted by the UNGA and affirmed by the UNSC. See *2005 World Summit Outcome*, UN doc. A/RES/60/1, 24 October 2005; and UN Security Council resolution 1674, 28 April 2006, UN doc. S/Res/1674 (2006).

¹⁸ UN members accepted that States have the primary responsibility to prevent and protect their populations from genocide, war crimes, crimes against humanity and ethnic cleansing. The international community should however encourage and help States to exercise their responsibilities, and has the responsibility to use peaceful means, and if necessary Chapter VII measures, to protect populations from these crimes. See *2005 World Summit Outcome*, UN doc. A/RES/60/1, 24 October 2005, paras.138-139; and ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, para 2.14.

¹⁹ For example, recalling its reference on RtoP (Resolution 1674) reaffirming paragraphs 138 and 139 of the 2005 World Summit Document, the UNSC passed Resolution 1706 authorising the deployment of peacekeepers in Darfur in 2006. UN Security Council resolution 1706 of 31 August 2006, UN doc. S/Res/1706 (2006).

²⁰ Mireille Delmas-Marty, “Ambiguities and Lacunae: The International Criminal Court Ten Years on”, *Journal of International Criminal Justice* 11 (2013): 553-561, at 556.

relation to the situation in Libya,²¹ in support of enforcement action authorised by the UNSC under Chapter VII.²² The linkage between the maintenance of peace under collective security and ICrimJ is underscored by the earlier adoption by the UNSC of resolution 1970, which referred the Libyan situation to the Prosecutor of the ICC.²³

The association between ICrimJ and human rights is even clearer. Prior to the UN Charter, there were few principles and rules governing the rights and obligations of individuals. This changed radically after WWII when alleviating human suffering and protecting peoples from violations of international humanitarian law and serious human rights crimes became a goal of the international community.²⁴ Towards this end, ICL was advanced to meet the immediate post-war requirements of delivering justice and punishing individuals for acts that are essentially large-scale violations of the human rights.²⁵ Since the establishment of the ICC, various commentators have understandably hoisted the Court as a mechanism to prevent and deter such crimes, as well as a means to protect and promote fundamental human rights.²⁶ With aspects that resemble the structure of a human rights court,²⁷ it can possibly be viewed as a collective enforcement model for achieving both the global enforcement and protection of human rights.²⁸

The preceding paragraphs illustrate the close association between ICrimJ and both collective security law and human rights law. That said, the research does not

²¹ Although the term “responsibility to protect” did not actually appear in either UNSC resolution 1970 or 1973, a majority of countries had invoked the notion of RtoP in support of measures and action by the UNSC and international community to protect civilians and avoid a massacre in Benghazi.

²² The UNSC determined that the situation constituted a threat to international peace and security, and authorised “all necessary measures” to protect civilians and civilian populated areas under threat of attack and to enforce compliance with a no-fly zone. See UN Security Council resolution 1973 of 17 March 2011.

²³ See UN Security Council resolution 1970 of 26 February 2011. It was determined that sufficient evidence existed to believe that crimes against humanity were committed by the regime of Muammar Gaddafi.

²⁴ Given the similarities between IHL and human rights law in terms of the form and the subjects of their rules, as well as their domain of application, Benison argues that “humanitarian law is best conceived of as a subset of human rights law”. Audrey Benison, “War Crimes: A Human Rights Approach to a Humanitarian Law Problem at the International Criminal Court”, *Georgetown Law Review* 88 (1999):141-175, at 142 and 158.

²⁵ ICL therefore forms one piece of the effort to achieve the global protection of human rights. Jamie Mayerfeld, “Who Shall Be Judge?: The United States, the International Criminal Court, and the Global Enforcement of Human Rights”, *Human Rights Quarterly* 25 (2003):93-129, at 98.

²⁶ See Giulio Gallarotti and Arik Preis, “Toward Universal Human Rights and the Rule of Law: The Permanent International Criminal Court”, *Australian Journal of International Affairs* 53 (1999): 95-111; and Evo Popoff, “Inconsistency and Impunity in International Human Rights Law: Can the International Criminal Court Solve the Problems Raised by the Rwanda And Augusto Pinochet Cases”, *George Washington International Law Review* 33 (2000):363-395.

²⁷ Benison, *supra* n.24, at 165-166.

²⁸ Mayerfeld, *supra* n.25, at 93 and 98.

seek to base or justify the notion of ICrimJ on the norms behind collective security or human rights. The truth is that they are like three peels of an orange – associated yet distinct. While these three fields are interlinked and increasingly overlap, they have different underlying principles and motivations: retribution and punishment; peace and stability; and universal respect for the equal worth of all individuals and uniform protection of fundamental freedoms. Indeed, collective security does not seek to punish individual perpetrators for committing atrocities, while ICrimJ is not about the promotion of human equality and liberty.²⁹ Human rights norms likewise do not directly concern themselves with the maintenance of global security, but do include a wide range of economic, social and cultural rights and freedoms not covered by collective security and criminal justice.

Although human rights and ICrimJ increasingly resemble each other, it is nevertheless important to avoid conflating the two.³⁰ ICrimJ typically comprises of strict and precise prohibitions, while human rights is usually characterised by generalised standards. Criminal law treaties often also contain a requirement to punish the perpetration of acts they are designed to prevent, unlike most human rights conventions.³¹ While international criminal institutions deal with the most serious violations of human rights, they should therefore not be viewed as human rights courts.³² Indeed, it must not be forgotten that as a response to criminalised acts of violence, ICrimJ has objectives and functions that linger on the goals of criminal law and punishment in international society, which are fundamentally distinct from both

²⁹ It is thus unclear whether the ICC will make a difference to the promotion and protection of human rights. Steven Ratner, “The International Criminal Court and the Limits of Global Judicialization”, *Texas International Law Journal* 38 (2003):445-453, at 452-453.

³⁰ The overlap is increased by the notion of transitional justice, which Freeman and Djukić link to the broader domain of human rights. However, La Rosa and Philippe note that transitional justice also seeks to address serious violations of international human rights and humanitarian law enforcing the law through criminal prosecutions. See Mark Freeman and Dražan Djukić, “The Relevance of *Jus Post Bellum*: A Practitioner’s Perspective”, in Carsten Stahn and Jann Kleffner, eds., *Jus Post Bellum: Towards a Law of Transition From Conflict to Peace* (The Hague: TMC Asser, 2008), at 214; and Anne-Marie La Rosa and Xavier Philippe, “Transitional Justice”, in Chetail, *supra* n.1, at 370-75.

³¹ For example, delegates to the ICCPR discussions specifically rejected the requirement for violators to be brought to the law by States. There was thus never an obligation to prosecute attendant to the duty to ensure the rights provided in the Covenant. See Commission on Human Rights, 6th Session, Supp. No. 5, UN Doc. E/CN.4/SR.195 (1950), at 6; and Michael Scharf, “The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes”, *Law and Contemporary Problems* 59 (1996):41-61, at 49-50.

³² Kirsch stresses that the ICC is therefore a criminal court limited to acts prohibited in customary and conventional international law. Philippe Kirsch, “The Role of the International Criminal Court in Enforcing International Criminal Law”, *American University International Law Review* 22 (2007): 539-547, at 543.

collective security and human rights. Claims that ICrimJ is merely a subset of the human rights movement inherently fail to recognise the criminal justice objectives and penal underpinnings for individual criminal liability.³³

Chapter 3 therefore does not seek to find similarities of the underlying rationales of these three interrelated areas, let alone at the normative level where universal appeal and acceptance exist. Rather, its focus is identifying lessons at the level of the execution of substantive law. There are two reasons for distinguishing the values behind the notions of collective security, human rights and ICrimJ from the instruments and practices that are created to realise those values. Firstly, the implementation stage is where one finds selectivity, division in terms of opinions and priorities, as well as legitimate variations in practice and across different cultures and societies. Many instances then bear the hallmarks of regional preferences and sentiments. As collective security law and human rights law are more mature fields of theory and application, they can proffer much to the discussion on regionalising ICrimJ in terms of best practices and lessons learned.

Secondly, the distinction between normative concept and substantive law helps to clarify the place of *jus cogens* in this research. Chapter 5 will discuss the possibility of regional *jus cogens* being an indicator of seriousness for regional crimes. However, the concept of *jus cogens* does not and is not intended to serve as a bridge between different branches of international law. “Accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted”,³⁴ *jus cogens* norms are intrinsically vague and general. They do not normally attach themselves to specific treaty pronouncements, even within conventions that are deemed peremptory, unless such regulations are broad or defined imprecisely. While *jus cogens* clearly has relevance in the normative aspirations of treaties associated with collective security, human rights and ICrimJ, much less can be said about the universality of individual parts within treaties that constitute collective security law, international human rights law, and ICL. Few specific rights have thus attained the status of *jus cogens*, and even then uniform interpretation and implementation of these rights is near impossible given the political, economic and cultural diversity between regional groupings of States. For example, despite the existence of an International

³³ These include deterrence; incapacitation and denunciation; rehabilitation and re-education; post-conflict reconciliation; and establishing the ‘truth’. See discussion in Chapter 4.

³⁴ Article 53, Vienna Convention on the Law of Treaties (1969).

Bill of Rights,³⁵ political realities dictate that cultural relativism cannot be avoided in application and enforcement of international human rights law.³⁶

The chapter therefore proceeds to consider how regional initiatives in the fields of collective security law and human rights law may hold valuable insights and practical lessons for conceptualising and implementing the regionalisation of ICrimJ within the context of an ASEAN regional framework. In particular, the chapter will examine the development of the AICHR to glean lessons about the potential promises and pitfalls of implementing a regional ICrimJ approach in Southeast Asia. In terms of the possible relationship with the ICC, an inherent question is whether regional organisations like ASEAN may adopt different mandates or must operate in sync with the Court.³⁷ A further issue will be whether regional mechanisms require the authorisation or moral legitimacy of the ICC to act.³⁸ Should regional bodies, acting on the consensus of member States, be curbed from independently ensuring regional peace and security, deterring atrocities, or addressing international crimes within their spheres of influence?³⁹

³⁵ The International Bill of Rights comprises the UDHR, ICESCR and ICCPR with its two optional protocols. See Office of the High Commissioner for Human Rights, “Fact Sheet No.2 (Rev.1), The International Bill of Human Rights”.

³⁶ Although human rights are universal in concept/substance and exist for all humanity everywhere in the world, human rights law allows for diversification and has been be variably implemented, both in terms of degree and content. Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2nd ed. (Ithaca: Cornell University Press, 2003), at 94.

³⁷ Besides the principles of competence allocation between global and regional organisations, the provisions of their constituent instruments also determine their limits, and regulate the issues of primacy between them and their conflicting jurisdictions. Alexander Orakhelashvili, *Collective Security* (Oxford: Oxford University Press, 2011), at 142 and 147.

³⁸ While the independence of regional organisations may be argued from the fact that Chapter VIII and Article 103 of the UN Charter do not bind international organisations, Blokker points out that Article 53 provides that enforcement action cannot be undertaken by regional arrangements or by regional agencies without UNSC authorisation. Niels Blokker, “Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by ‘Coalitions of the Able and Willing’”, *European Journal of International Law* 11 (2000): 541-568, at 551.

³⁹ An effective international system for the maintenance of peace and security may potentially only be possible through an interplay at the various levels. Christoph Schreuer, “Regionalism v Universalism”, *European Journal of International Law* 6 (1995), 477-499, at 498.

3.1 ASEAN and Collective Security

ASEAN recently celebrated its forty-fifth anniversary in 2012,⁴⁰ and is best understood as a tool for conflict avoidance and dispute management.⁴¹ The organisation is primarily focused on confidence building and ensuring transparency between member States,⁴² with State sovereignty and the principle of non-interference serving as its fundamental norms.⁴³ The ASEAN Declaration of 8 August 1967 states that a key aim and purpose of the organization is “to promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region”.⁴⁴ The 1976 Treaty of Amity and Cooperation (TAC) added that this would be achieved, *inter alia*, through the defining ASEAN norm of “non-interference in the internal affairs of one another”.⁴⁵ These cardinal ASEAN documents then reveal both an opening for the promotion of ICrimJ and a major potential challenge to the regional enforcement of ICL, which is certain to undermine State sovereignty and the principle of non-intervention.⁴⁶

As stability is paramount for the countries of Southeast Asia, ASEAN’s most important contributions have been and continue to be reducing intra-regional

⁴⁰ ASEAN is an organisation created to ensure stability among a heterogeneous grouping of weak postcolonial states in Southeast Asia. It is a rare example of a Cold War-inspired indigenous ‘Third World’ organisation that has survived beyond 1989. See David Jones and Michael Smith, “Making Process, Not Progress: ASEAN and the Evolving East Asian Regional Order”, *International Security* 32 (2007):148–184, at 149; and Samuel Sharpe, “An ASEAN way to security cooperation in Southeast Asia?”, *The Pacific Review* 16 (2003): 231-250, at 231.

⁴¹ The regional organisation was established in 1967 by five countries (Indonesia, Malaysia, the Philippines, Singapore and Thailand) as a mechanism to promote regional peace and stability, and to build intra-regional confidence. Five other States in the region were later admitted: Brunei (1984), Vietnam (1995), Laos and Myanmar (1997), and Cambodia (1999).

⁴² ASEAN was created to serve three mutually reinforcing security functions: (1) mitigate tensions between its members by building political and economic connections; (2) contribute to political stability and alleviate the domestic social conditions nurturing communist insurgency through economic development; and (3) manage the regional security environment, without external intervention, thereby reducing their vulnerability to the machinations of the great powers. Rajaratnam thus stated that ASEAN was born out of the common fear of inter-State conflict and the communist threat, “rather than idealistic convictions about regionalism”. See Shaun Narine, “ASEAN and the Management of Regional Security”, *Pacific Affairs* 71 (1998):195-214, at 196; and S. Rajaratnam, “ASEAN: The Way Ahead”, in Kernial Singh Sandhu and Sharon Siddique, eds., *ASEAN Reader* (Singapore: ISEAS, 1992), at xxvi.

⁴³ As they were all former colonies, with the exception of Thailand, ASEAN member states are “very keen on preserving their sovereignty”. See Anna van der Vleuten, “Contrasting Cases: Explaining Interventions by SADC and ASEAN”, *Closing or Widening the Gap? Legitimacy and Democracy in Regional Integration Organizations*, eds. Andrea Hoffman and Anna van der Vleuten (Hampshire: Ashgate Publishing, 2007), at 164.

⁴⁴ See *ASEAN Declaration*, 8 August 1967.

⁴⁵ See Article 2(c), *1976 Treaty of Amity and Cooperation in Southeast Asia*.

⁴⁶ While the ASEAN Declaration and TAC are reflective of “internationalist and postcolonial values of the postwar era”, Sharpe notes that the non-negotiable inviolability of state sovereignty, encapsulated in the ASEAN principle of non-intervention, is still most critical to member States. See Jones, *supra* n.40, at 154; and Sharpe, *supra* n.40, at 247.

tensions,⁴⁷ as well as facilitating ‘community-building’ amongst member States.⁴⁸ While the end of the Cold War heralded a shift in focus towards regional economic development, the organisation remains an association of States predicated on the maintenance of regional security and order through collective security.⁴⁹ The norms and procedures of ASEAN – created to prevent, manage and resolve intra-regional conflict, as well as to govern the bilateral and multilateral arrangements of member States against common internal and external threats – are crucial elements of inter-State relations in Southeast Asia.⁵⁰

At this juncture, it is important to recognise that ASEAN is no longer simply a series of regularised ministerial and bureaucratic consultations. In December 2005, the leaders of the ten member States reached an agreement at the 11th ASEAN Summit to draft a Charter for the Association.⁵¹ Recognising the importance of having an appropriate institutional framework for the organisation, the ASEAN Charter seeks to codify all ASEAN norms, rules, and values. More importantly, it also confers a legal personality to ASEAN and will ‘determine the functions, develop areas of competence of key ASEAN bodies and their relationship with one another in the overall ASEAN structure’.⁵² A high-level task force was subsequently set up to draft the ASEAN Charter, which was signed on 20 November 2007 and entered into force on 15 December 2008. It is particularly noteworthy that comprehensive political and security cooperation within ASEAN which has been increasingly linked to the notion of ICrimJ through the inclusion of post-conflict peace-building goals.⁵³ Hence, an opportunity exists to develop ICL within the ASEAN collective security framework.

⁴⁷ Leifer aptly describes its processes as having “an evident dimension of balance of power” within “an institutional framework of multilateral constraint”. Michael Leifer, “Truth about the Balance of Power,” in Kin Wah Chin and Leo Suryadinata, eds., *Michael Leifer Selected Works on Southeast Asia*, (Singapore: Institute of Southeast Asian Studies, 2005), at 153.

⁴⁸ Acharya contends that the ultimate goal of ASEAN is the creation of a “pluralistic security community” in Southeast Asia, which McCoubrey and Morris contend also stems from distinctive regional political and cultural traditions. Amitav Acharya, “Regional Military-Security Cooperation in the Third World: A Conceptual Analysis of the Relevance and Limitations of ASEAN”, *Journal of Peace Research* 29 (1992):7-21, at 12; Hilaire McCoubrey and Justin Morris, *Regional Peacekeeping in the post-Cold War Era* (The Hague: Kluwer Law International, 2000), at 160.

⁴⁹ The focus on regional confidence building and preventive diplomacy continued in the post-Cold war period with the establishment of the ASEAN Regional Forum (ARF) in 1993. It has since become the most prominent multilateral security arrangement in the region. Hiro Katsumata, “ASEAN and human rights: resisting Western pressure or emulating the West?”, *The Pacific Review* 22 (2009): 619–637, at 629.

⁵⁰ Acharya, *supra* n.48, at 17.

⁵¹ See 2005 Kuala Lumpur Declaration on the Establishment of the ASEAN Charter, 12 December 2005.

⁵² *Ibid.*

⁵³ See Annex 1, *2004 Vientiane Action Programme*, 29 November 2004.

The next section thus gathers lessons for the regionalisation of ICrimJ within Southeast Asia from the promotion of regional peace and security through collective security. In particular, it addresses whether a regional organisation, acting on the consensus of member States, should be curbed from independently ensuring regional peace and security, deterring atrocities, or addressing international crimes within their spheres of influence.

3.1.1 Lessons from the Regional Exercise of Collective Security

Although collective security is primarily associated with the UN system,⁵⁴ the number of regional organisations engaged in the maintenance of peace and security has grown dramatically since the 1990s.⁵⁵ After the Cold War, regional organisations not only increased the scope of their cooperation with the UN beyond peacekeeping operations,⁵⁶ but also significantly improved their abilities to perform a collective security role and became “hyper active in regional conflicts”.⁵⁷

These developments were partly due to the transformation of existing inter-State alliances and establishment of new institutions with collective security mandates,⁵⁸ as well as the broadening definitions of intra-State conflicts and threats to the peace and security of the region.⁵⁹ Another factor was the increased demand for peace support action that UN infrastructure, resources and experience could not cater

⁵⁴ Collective security is commonly associated with the UN as it is the main actor in this field, and also because it has been argued by scholars like Kelsen to be “the main purpose” of the UN. See Kelsen, *supra* n.3, at 783.

⁵⁵ See Orakhelashvili, *supra* n.37, at 64-88.

⁵⁶ Regional peacekeeping dates back to 1961, when Arab League Security Forces were stationed in Kuwait. Hussein Hassouna, *The League of Arab States and Regional Disputes: A Study of Middle East Conflicts* (New York: Oceania Publishers, 1975).

⁵⁷ Ademola Abass, *Regional Organisations and the Development of Collective Security* (Oxford: Hart Publishing, 2004), at 141. There was also a significant increase in references to regional organisations in UNSC resolutions after the Cold War ended in 1991, which illustrated both their increased presence and clout in maintaining international peace and security. Renata Sonnenfeld, *Resolutions of the United Nations Security Council* (Leiden: Martinus Nijhoff Publishers, 1988), at 103.

⁵⁸ Some organisations also crafted new mandates expressly providing for collective security actions. For example, ECOWAS reinvented itself in 1990 as a collective security organisation and set the pace for the development of regional collective security systems. See Ademola Abass, “The Implementation of ECOWAS New Protocol and Security Council Resolution 1270 in Sierra Leone: New Developments in Regional Intervention”, *University of Miami International and Comparative Law Review* 10 (2002): 177-216.

⁵⁹ African regional organisations have, in particular, revised their views on the matter, and by extension the doctrine of non-intervention, largely because they recognise that regional peace, stability and security cannot be obtained without addressing the intra-State conflicts in member States.

for.⁶⁰ The belief that regional organisations might alleviate the pressure felt by the UN was clearly stated in a position paper by the UN Secretary-General in 1995,⁶¹ and their crucial role in maintaining peace and security was reiterated in a report by the UN Secretary-General in 2006.⁶² The UNSC subsequently passed Resolution 1631 emphasising that cooperation with regional and sub-regional organisations are useful, and their contributions complemented the work of the UN in maintaining peace and security.⁶³

From the regional point of view, besides the greater and more immediate impact of a breakdown in regional and domestic stability, further justifications have been provided for assuming greater power and authority in maintaining localised peace and security in the post-Cold War world.⁶⁴ One common explanation for assuming responsibility in securing regional peace is the failure of the UNSC to discharge its duty.⁶⁵ A related (but subtly different) basis is the notorious selectivity of the UN system,⁶⁶ exacerbated by the political machinations within the UNSC in determining Chapter VII action,⁶⁷ which leaves situations unresolved and forces affected States to respond. For all these reasons, regional organisations have then been

⁶⁰ Christine Gray, *International Law and the Use of Force*, 3rd ed. (Oxford: Oxford University Press, 2008), at 370; and Jim Cloos, "UN-EU Cooperation on Crisis Management: Putting Effective Multilateralism into Practice", in Jan Wouters, Frank Hoffmeister, and Tom Ruys, eds., *The United Nations and the European Union: An Ever Stronger Partnership* (The Hague: TMC Asser, 2006), at 261.

⁶¹ Several forms of cooperation between the UN and regional organisations were highlighted, including: (a) consultations; (b) diplomatic support; (c) operational support; (d) co-deployment; and (e) joint operations. *Supplement to an Agenda For Peace: Position Paper Of The Secretary-General On The Occasion Of The Fiftieth Anniversary Of The United Nations*, UN doc. A/50/60 - S/1995/1, 3 January 1995, at para.86.

⁶² UN General Assembly, *A Regional-Global Security Partnership: Challenges and Opportunities*, 28 July 2006, UN doc. A/61/204-S/2006/590.

⁶³ UN Security Council resolution 1631, 17 October 2005, UN doc. S/Res/1631 (2005).

⁶⁴ The trend towards regionalisation in the post-Cold War era has been caused by various regional desires, interests and experiences. Examples include the desire for 'African solutions for African problems', ASEAN's overarching concerns about Southeast Asian security, and the OAS experience with democratisation and preventive diplomacy. Orakhelashvili, *supra* n.37, at 101.

⁶⁵ Various regional organisations have assumed responsibility and acted in the defence of regional collective interests, such as NATO in Kosovo and the AU in Sudan and Somalia. Abass notes that there have also been sub-regional actions without UNSC authority, like the ECOWAS interventions in the civil wars in Liberia and Sierra Leone. Ademola Abass, "The New Collective Security Mechanism of ECOWAS: Innovations and Problems", *Journal of Conflict and Security Law* 5 (2000): 211-59.

⁶⁶ The UN cannot address every conflict in the world because of its various limitations, and will be selective regarding which conflicts deserve its attention. See Oscar Schachter, "The UN Legal Order: An Overview", in Christopher Joyner, ed., *The United Nations and International Law*, (Cambridge, Cambridge University Press, 1997), at 16; and Koskenniemi, *supra* n.3, at 460-462.

⁶⁷ The uneven and selective nature of Chapter VII action by the UN has been highlighted by various scholars. For example, see Elihu Lauterpacht, "Foreword", in Marc Weller, ed., *Regional Peacekeeping and International Enforcement: The Liberian Crisis*, (Cambridge: CUP, 1994), at ix; and Koskenniemi, *supra* n.3, at 460-462.

increasingly portrayed as natural alternatives and guarantors of collective security and stability.⁶⁸

At this juncture, it is noted that the preservation of localised peace and security by regional collective security mechanisms is technically not antagonistic to the UN Charter.⁶⁹ The (albeit subordinated) role of regional organisations is even stated in Chapter VIII of the UN Charter, which acknowledges the maintenance of peace and security by such bodies as appropriate regional actions provided that they are consistent with UN principles and purposes.⁷⁰ States are even expected to “make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies” before approaching the UNSC.⁷¹ The ‘regionalisation of collective security’ thus refers to and is witnessed in the devolution of UN authority and power to regional organisations in accordance with Chapter VIII of the UN Charter.⁷²

Nevertheless, the push by regional organisations for greater autonomy in terms of collective security remains controversial because it challenges the pre-eminence of global solutions,⁷³ and throws into question the validity of regional options. While Chapter VIII lies at the heart of all regional actions within the UN framework, some scholars posit that collective security efforts by regional organisations neither depends on nor revolves around it.⁷⁴ Intervention by a regional organisation may even be possible within the context of the

⁶⁸ Some regional organisations have even codified a right of intervention in their spheres of influence and may now intervene (without being specifically invited) in the inter-state and/or intra-state conflicts of their member States. For example, Article 4(h) of the AU Constitutive Act confers the organisation with the right to intervene, while Article 11(2) of the SADC Protocol on Politics, Defence and Security Cooperation declares that the organisation may seek to resolve any significant inter-state conflict and intra-state conflicts of State Parties.

⁶⁹ In fact, Art 53(1) states that the UNSC shall utilise regional arrangements or agencies for enforcement action.

⁷⁰ Art 52(1), UN Charter.

⁷¹ Art 52(2), UN Charter.

⁷² Michael Pugh, “The World Order Politics of Regionalisation”, in Michael Pugh and Waheguru Sidhu, eds., *The United Nations and Regional Security: Europe and Beyond* (Boulder: Lynne Rienner Publishers, 2003), at 31.

⁷³ See Bjorn Hettne and Fredrik Soderbaum, “The UN and Regional Organisations in Global Security: Competing or Complementary Logics”, *Global Governance* 12 (2006): 227-232; and S Neil MacFarlane and Thomas Weiss, “Regional Organisations and Regional Security”, *Security Studies* 2 (1992):6-37.

⁷⁴ While the ideal form of collective security encompasses every State, it does not mean that ‘non-universal’ or ‘closed’ regional organisations cannot deal with local threats to, or breaches of, the peace. Abass argues that decentralised collective security may thus be “a necessary development” in the post-Cold War international order. Abass, *supra* n.57, at 181.

UN Charter if State consent is obtained,⁷⁵ or there is an emergency situation emanating from a consistent pattern of gross and reliably attested violations of basic human rights.⁷⁶ It is noteworthy that collective security is then not a concept created by the UN, and States had participated in and employed such systems before the UN was founded.⁷⁷ In this vein, Abass contends that the primary responsibility for the maintenance of peace and security was conferred by States to the UNSC, which in carrying out this duty “acts on their behalf”.⁷⁸ If the UNSC fails to intervene or authorise a regional action, regional organisations may possibly act based on their constitutive documents.⁷⁹ Regional organisations are nevertheless unambiguously forbidden from taking enforcement action without UNSC authorisation.⁸⁰ In response to Abass, Orakhelashvili points out that the AU legal framework does not affect the obligations under the UN Charter and should not be seen as an assertion of a right by the regional organisation to use force against States without UNSC authorisation.⁸¹ Moreover, read in its entirety, the ECOWAS Protocol accepts that any enforcement action must then be premised on the necessity of obtaining UNSC authorisation.⁸² Indeed, Ress notes that Article 53 of the UN Charter does not provide for other “legally possible enforcement measures” apart from the power of the UNSC, but

⁷⁵ However, the invitation or consent by the government may only be considered as justification for military intervention when the government retains effective control over the country. Christian Walter, “Security Council Control over Regional Action”, *Max Planck Yearbook of United Nations Law* 1 (1997): 129-163, at 154.

⁷⁶ The right of self-defence by regional organisations is an emergency function provided in Article 51 of the UN Charter. Walter argues that a comparable right to employ humanitarian intervention as an ‘emergency solution’ exists when regional organisations are faced with UNSC inaction and qualified violations of human rights. *Ibid.*

⁷⁷ Besides the League of Nations that embodied a decentralised form of collective security, early regional collective security systems included the US Monroe Doctrine of 1823 and the Inter-American System that contained procedures for a collective response to both external aggression and conflicts among regional States.

⁷⁸ See Art 24(1), UN Charter. Abass argues that any failure by the UNSC to fulfil its duties under the responsibility to maintain international peace and security may cause this power to be returned to States. Abass, *supra* n.57, at 140.

⁷⁹ Abass asserts that the AU and ECOWAS can not only take “whatever action it deems appropriate”, but also “continue to implement its own mandate even if the UN decides eventually on a different one”. While the AU Constitutive Act affirms the right to intervene in a Member State “in respect of grave circumstances, namely war crimes, genocide and crimes against humanity”, the ECOWAS New Protocol similarly codifies the right of humanitarian intervention and the use of force to restore democratic governments. See Article 4(h) of the Constitutive Act of the African Union; and Article 7(1)(e) of the AU Protocol Relating to the Establishment of the Peace and Security Council; Abass, *supra* n.65; Abass, *supra* n.58, at 178; and Abass, *supra* n.57, at 160.

⁸⁰ See Art 53(1), UN Charter. Allain notes that Articles 42 and 51 of the UN Charter are predicated on the control of the UNSC, and regional agencies and arrangements “do not escape that control”. Jean Allain, “The True Challenge to the United Nations System of the Use of Force: The Failures of Kosovo and Iraq and the Emergence of the African Union”, *Max Planck United Nations Yearbook* 8 (2004):237-289, at 248-249.

⁸¹ Orakhelashvili, *supra* n.37, at 270.

⁸² *Ibid.*, at 271.

instead broadens “the modalities for the execution” available to the UNSC by including regional organisations.⁸³ It is noteworthy that the NATO Treaty acknowledges “the primary responsibility of the Security Council for the maintenance of international peace and security”,⁸⁴ while OAS members also pledge not to resort to the threat or the use of force in any way inconsistent with UN Charter provisions.⁸⁵ The subordinate role of regional arrangements is further emphasised by Article 54 of the UN Charter, which requires the UNSC to at all times be kept fully informed of activities undertaken or in contemplation by regional organisations for the maintenance of peace and security.⁸⁶ McCoubrey and Morris therefore stress that regional organisations have an “unequivocally subordinate role” under Chapter VIII of the UN Charter, and remain as “delegates rather than UN-alternatives”.⁸⁷

On that note, it is important to understand that the collective security system encased in the UN Charter provides for the pacific settlement of situations that endanger peace and security (Chapter VI), as well as action with respect to threats to the peace, breaches of the peace or acts of aggression (Chapter VII).⁸⁸ Actionable collective security can then be classified into three groups of activities: (1) conflict prevention through deterrence, diplomacy, or mechanisms for pacific settlement; (2) peace-building and peacekeeping;⁸⁹ or (3) enforcement of a collective mandate to the belligerents.⁹⁰ Collective security is however often conflated with the maintenance or restoration of peace and security through the use of military action (Articles 42 and 53). It should be recognised that enforcement action, which typically refers to reactive military measures to restore and keep the peace, is just one facet of collective security. Indeed, collective security consists of both proactive and reactive dimensions, and need not include the use of force to ensure or preserve peace

⁸³ Georg Ress, “Article 53”, in Bruno Simma, ed., *The Charter of the United Nations: A Commentary*, (Oxford: Oxford University Press, 1995), at 687.

⁸⁴ Article 7, North Atlantic Treaty (1949).

⁸⁵ Article 1, Inter-American Treaty of Reciprocal Assistance (1947)

⁸⁶ Article 54, UN Charter. Claude thus commented that regional organisations should be subordinated to and harmonised with the UN, and only serve as adjuncts subjected to the “direction and control of the central organisation”. Claude, *supra* n.10, at 114.

⁸⁷ McCoubrey, *supra* n.48, at 49-50.

⁸⁸ Collective security encompasses various processes for maintaining peace and security: (1) inducing States to delay hostilities; (2) the pacific settlement of disputes; and (3) the use force if pacific settlement fails. Ernst Haas, “Collective Security and the Future International System”, in Richard Falk and Cyril Black, eds., *The Future of international Legal Order*, (Princeton: Princeton University Press, 1969), at 225.

⁸⁹ The UN Security Council stated UN peace-building and peacekeeping mission mandates should now, where appropriate, also include provisions regarding the protection of civilians, particularly those under imminent threat of physical danger within their zones of operation. See UN Security Council resolution 1674 of 28 April 2006, S/Res/1674 (2006), at para.16.

⁹⁰ Joseph Lepgold, “Regionalism in the Post-Cold War Era”, in Diehl, *supra* n.5, at 10.

and security. While collective security does encompass a military response, it is not interchangeable with enforcement action.⁹¹

This distinction is crucial for our discussion on ICrimJ mechanisms for two reasons. Firstly, ICrimJ institutions or arrangements that are designed to help maintain or restore of local peace and security are undoubtedly non-military measures concordant with UN Charter objectives. This is illustrated by the UNSC decision to establish *ad hoc* international criminal tribunals under Article 41 of the UN Charter to deal with intra-State ethnic conflicts.⁹² Secondly, by distinguishing non-military measures from muscular enforcement actions under decentralised collective security, the debate on the legal concerns and validity of self-authorized military interventions by regional organisations can be avoided.⁹³ Indeed, Gray points out that debate on the legality of independent regional action has essentially centred on the compatibility of military measures with the UN Charter and with general international law.⁹⁴

The key question is then whether the regionalisation of ICrimJ will entail the use of force to prevent, halt and punish international crimes. As applying non-military measures to ensure peace and stability is not the *domaine réservé* of universal institutions, independent regional responses, including establishing *ad hoc* regional criminal tribunals, become less problematic and less likely to be denounced as unlawful. It is noteworthy that the AU has decided that the case against Hissène Habré fell within its competence **based on a report** of the Committee of Eminent African Jurists.⁹⁵ The AU preference to obviate international prosecutions and enforce ICL regionally is further made clear by the decision to expand the mandate of the African Court of Human and Peoples' Rights (AfCHPR) to try

⁹¹ Many differences exist between decentralised collective security and decentralised enforcement action, which are of practical significance and have serious legal implications. Abass, *supra* n.57, at 112 and 157.

⁹² See UN Security Council resolution 827 of 25 May 1993, S/Res/827 (1993); and UN Security Council resolution 955 of 8 November 1994, S/Res/955 (1994).

⁹³ The NATO airstrikes during the 1999 Kosovo crisis highlights the legal conundrum surrounding the use of force by regional agencies. While they were not denounced as unlawful by the international community, they were also not explicitly sanctioned and arguably lacked validity without UNSC authorisation. Thus, scholars note the dangers of such unilateral enforcement actions, warn that it should not be encouraged, and argue that the NATO decision on Kosovo must not become a precedent for a general right of military intervention without UNSC authorisation. Nigel White and Robert Cryer, "Unilateral Enforcement of Resolution 687: A Threat Too Far?", *California Western International Law Journal* 29 (1999): 243-282, at 281; and Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspects", *European Journal of International Law* 10 (1999):1-22, at 20.

⁹⁴ Gray, *supra* n.60, at 396.

⁹⁵ Established by the AU on 24 January 2006, the Committee was tasked "to consider all aspects and implications of the Hissène Habré case as well as the options available for his trial". See Decision on the Hissène Habré Case and the African Union, Doc. Assembly/AU/Dec.103(VI), Assembly of the African Union, Sixth Ordinary Session, 23-24 January 2006, Sudan. That said, it is recognised that other regional organisations may not assess that they a similar competence or existing mandate to try international crimes.

international crimes.⁹⁶ Problems may however be created if the AfCHPR completely disregards the ICC and the potential overlaps between the two judicial bodies are ignored. Such difficulties will be further magnified if the international and regional initiatives have distinct mandates with different aims, and States are then faced with conflicting legal obligations to various political and judicial institutions. Hence, it would be imprudent for any proposed regional ICrimJ mechanism to adopt a mandate that is vastly different from the ICC. Based on the experience of collective security,⁹⁷ a lesson for the Court is that the parameters of the relationship with the regional organisation need to be well defined and well coordinated. In terms of the distribution of powers and responsibilities between the UN and regional organisations for the maintenance of peace and security, principles like ‘subsidiarity’, ‘burden-sharing’, and ‘burden-shifting’ have been commonly used.⁹⁸ Under such a framework, a reshaping of legal understanding is not required as regional action is then “no more than a reactivation of an important potential which was inherent in the UN system *ab initio*”.⁹⁹ Although this may be taken to signal a hierarchy amongst multilateral organisations that are universal and regional, it need not be the case regarding jurisdiction over international crimes. Under the *ne bis in idem* regime of the ICC,¹⁰⁰ convictions and acquittals by the ICC preclude an individual being tried by another court for the same international crime (Article 20(2)), while individuals tried by another court for genocide, crimes against humanity, and war crimes will similarly not be tried by the ICC with respect to the same conduct (Article 20(3)).¹⁰¹ It is then crucial to note that term used is “another court”, and there are no further references to indicate that regional courts are excluded. Indeed, Article 17(1)(c) simply states that the ICC shall determine that a case is inadmissible where the individual concerned “has already been tried for conduct which is the subject of the complaint”, and a trial

⁹⁶ Decision on Africa’s Relationship with the International Criminal Court (ICC), Doc. Ext/Assembly/AU/Dec.1 (Oct.2013), Extraordinary Session of the Assembly of the African Union, 12 October 2013, Ethiopia.

⁹⁷ *Report of the Secretary-General on the relationship between the United Nations and regional organisations, in particular the African Union, in the maintenance of international peace and security*, UN doc. S/2008/186, 7 April 2008, at para.8.

⁹⁸ See David O’Brien, “The search for subsidiarity: The UN, African Regional Organisations and Humanitarian Action”, *International Peacekeeping* 7 (2000): 57-83; and Eric Berman, “The Security Council’s Increasing Reliance on Burden-Sharing: Collaboration or Abrogation?”, *International Peacekeeping* 4 (1998):1-21.

⁹⁹ McCoubrey, *supra* n.48, at 212 and 230.

¹⁰⁰ See Article 20, ICC Statute.

¹⁰¹ The exceptions are if ‘sham trials’ were conducted, or if proceedings were not conducted independently or impartially according to due process under international law. See Articles 20(3)(a) and (b), ICC Statute.

by the ICC is not permitted under Article 20(3).¹⁰² This not only opens the door for the participation of regional courts, but also paves the way for an equal relationship between the ICC and a regional counterpart based on a congruent and cooperative division of work.¹⁰³

In sum, certain minimum common positions on ICL, such as on the definition of international crimes, must be adopted to ensure that international and regional approaches for ICL are mutually complementary and that the total effort of the international community for upholding ICrimJ is optimised. While it is clear that regional organisations like ASEAN will depend on the authorisation of the UN to undertake enforcement actions within the context of collective security, it should however not be limited in terms of adopting non-military measures to prevent, halt and punish international crimes.

If regional ICrimJ solutions are then to be considered within the framework of actionable collective security by ASEAN, they will probably be most synonymous with non-enforcement peacekeeping efforts.¹⁰⁴ Firstly, both sets of action require the (perceived) impartiality of external parties and acquiescence of the receiving State(s).¹⁰⁵ Indeed, it must be remembered that witnesses to and evidence of an international crime are difficult to secure if prosecutors are denied access by the State concerned, let alone custody of the alleged perpetrator(s).¹⁰⁶ Such permission and support from the State concerned is akin to the fundamental consent for foreign peacekeepers to be deployed within its borders. Secondly, both undertakings promote transitional justice, leading to post-conflict reconciliation, reconstruction and rehabilitation of the affected societies.¹⁰⁷ Thirdly, these measures actually require

¹⁰² See Article 17(1)(c), ICC Statute.

¹⁰³ During the ICC ASP meeting in November 2013, Kenya had suggested, *inter alia*, an amendment to the section of the Preamble of the ICC Statute setting out its complementary nature, to allow a regional criminal court to prosecute alleged crimes committed on the continent. See further discussion in Chapter 4.

¹⁰⁴ Peacekeeping are defined as the provision of temporary post-conflict security by internationally mandated forces that are mainly military in composition, “normally consensually and impartially unless the peace requires restoration or civilians need protection”. White, *supra* n.1, at 213.

¹⁰⁵ A current challenge in developing peacekeeping as a concept however is how it should properly function in increasingly common “semi-permissive or non-consensual” environments. Instead of being traditionally understood as neutrality and non-intervention, White highlights that impartiality has become the “lack of partiality” in the carrying out of a peacekeeping mandate. See Wibke Hansen, Oliver Ramsbotham, and Tom Woodhouse, *Hawks and Doves: Peacekeeping and Conflict Resolution* (Berghof Research Centre for Constructive Conflict Management, 2004), at 6; and White, *supra* n.1, at 221.

¹⁰⁶ Such problems have surfaced in cases before the ICTY and ICTR, as well as the ICC. The problem is compounded for the ICC if a non-State party is involved.

¹⁰⁷ The 2000 Brahimi Report noted that peacekeeping has evolved to “incorporate a complex model of many elements ... working together to build peace in the dangerous aftermath of

regional organisations and member States to contribute materially and financially to resolve a situation that threatens local peace and security. More importantly, they require the doctrine of non-intervention to be set aside (or waived beforehand in a multilateral treaty).¹⁰⁸ The ability of third-party States to intervene in the face of large-scale human rights abuse and atrocities may then possibly serve as a credible deterrent to international crimes.¹⁰⁹ Given their similarities within the ASEAN collective security structure, the next section therefore examines the practical benefits, barriers and hazards of regional peacekeeping operations for any useful insights for developing regional approaches to upholding ICrimJ.¹¹⁰

3.1.1.1 Regional Peacekeeping Operations

The experience of regional peace support efforts indicate that regional organisations do not only play a resource role, but also offer much in terms of confidence building amongst member States and the maintenance of regional stability.¹¹¹ Moreover, besides the advantage of proximity, they have familiarity and ‘local knowledge’ about the conflict and its underlying issues and problems, which are critical to the success of any peace support process and operation.¹¹² In this connection, other advantages of a localised solution include better placement to detect early signs of conflict and react quicker,¹¹³ as well as averting ‘parachuting’ methods and models from other parts of the world that would be inappropriate for local conditions.¹¹⁴ Last but not least,

civil wars”. They include reintegrating former combatants into civilian society, providing technical assistance for democratic development, and promoting conflict resolution and reconciliation techniques. See *Report of the Panel on United Nations Peace Operations*, UN doc. A/55/305-S/2000/809, 21 August 2000, at paras.12-13.

¹⁰⁸ The doctrine of non-intervention, principally upheld by the UN Charter, is linked to state sovereignty, which must be set aside (or waived) by the State concerned before other parties can intervene domestically.

¹⁰⁹ Peace-support missions with more robust enforcement powers prove to be stronger deterrents against ‘spoliers’ and those seeking to harm civilians, compared to traditional symbolic non-interventionist peacekeeping forces. White, *supra* n.1, at 220.

¹¹⁰ There is a substantial amount of legal discourse on regional intervention of this nature, which first and foremost conclude that such actions are widely regarded in international law as legitimate and valid collective security mechanisms for securing peace and security. For example, see Carolyn Shaw, “Regional Peacekeeping: An Alternative to United Nations Operations?”, *Journal of Conflict Studies* 15 (1995): 59-81; and Paul Diehl, “Institutional Alternatives to Traditional UN Peacekeeping: An Assessment of Regional and Multinational Options”, *Armed Forces and Society* 19 (1993): 209-230.

¹¹¹ For a good discussion on regional peace support missions, see Orakhelashvili, *supra* n.37, at 294-314.

¹¹² Regional organizations thus often enjoy “a special legitimacy amongst local actors”. James Cockayne and David Malone, “United Nations Peace Operations: Then and Now”, *International Peacekeeping: The Yearbook of International Peace Operations* 9 (2004): 1-21, at 11.

¹¹³ Some regional organisations may also be able to provide rapid response capabilities when the UN is unable to act. These include the EU, NATO, and AU that have or are developing such capabilities. Gray, *supra* n.60, at 374.

¹¹⁴ Nicola Baker and Leonard Sebastian, “The problem with parachuting: Strategic studies and security in the Asia/Pacific Region”, *Journal of Strategic Studies* 18 (1995): 15-31.

regional organisations are more likely to remain focused and committed to the long-term tasks of post-conflict reconstruction and reconciliation.

In this vein, ASEAN and its member States have intervened or been called upon to do so in various regional crises. For example, during the collapse of peace and security in East Timor, Indonesian Foreign Minister Ali Alatas stated that ASEAN countries were “uniquely placed” to serve in the proposed international peacekeeping force “as they, more than any other countries, understood the regional characteristics, dimensions and sensitivities of the problem”.¹¹⁵ In 2003, ASEAN departed from its non-intervention principle following the detention of Aung San Suu Kyi under house arrest by the military junta in Myanmar.¹¹⁶ It even implicitly threatened that Myanmar’s membership could be suspended under the ASEAN Charter that was being developed.¹¹⁷

The appeal of a regional approach is undeniable in the combined presence of sustained political will backed by familiarity with the problem coupled with suitable lasting solutions, credible organisational infrastructure and appropriate mandates,¹¹⁸ as well as adequate funding and resources. It is however recognised that such an ideal confluence of robust capabilities does not always exist in reality. Moreover, the structure, mandate and constitutional framework of various regional bodies will differ, as will their organisational character, ethos and goals.¹¹⁹ Differences will then be further exacerbated in practice by their disparate material capacities and operational capabilities.¹²⁰ Undoubtedly, not all regional organisations will have the adequate financial resources, or the necessary manpower and expertise, to address the myriad of potential problems both quickly and for a sustained period. Not only may regional

¹¹⁵ See UN Security Council Press Release, UN Doc. SC/6727, 15 September 1999.

¹¹⁶ See 2003 Joint Communique of the 36th ASEAN Ministerial Meeting, 17 June 2003.

¹¹⁷ Sarinna Areethamsirikul, “Realizing the Role of International Pressures on the Use of the ASEAN Way: Comparative Cases between Myanmar and Thailand”, *Paper presented at the annual meeting of the International Studies Association 48th Annual Convention*, 28 Feb 2007, at 14-15. Available at http://www.allacademic.com/meta/p180225_index.html.

¹¹⁸ In the mandates of some regional bodies, specific grave circumstances have been identified to warrant intervention in member States. For example, the AU is empowered to intervene in a Member State in respect of war crimes, genocide and crimes against humanity (Art 4(h) of the AU Constitutive), while the SADC can respond to a 'significant intra-state conflict' in a State Party that involves large-scale violence, including genocide, ethnic cleansing and gross violation of human rights (Art 11(2)(b)(i) of the SADC Protocol on Politics, Defence and Security Cooperation).

¹¹⁹ Different regional organisations have different political objectives and expectations by their member States – due to the diversity in the political, economic and cultural dynamics, as well as the varied structure of inter-State relations in each region. McCoubrey, *supra* n.48, at 236.

¹²⁰ The AU and ECOWAS provide examples of regional organisations that have played large roles in maintaining peace and security but have then to rely on developed States for both financial and logistical support to accomplish their operations.

organisations lack the capacity for sustained operations and need international assistance, but some problems may also not be resolvable at the regional level and require the greater authority of the international community.¹²¹ These are all issues that may prove identical and relevant for the regionalisation of ICrimJ.

On the other hand, while a well-resourced and well-run regional organisation may effectively respond to international (or regional) crimes, it is questionable how much a regional initiative can remain impartial and not take sides in a particular dispute, let alone prop up the government concerned.¹²² This is especially a concern in Southeast ASEAN, where the interpersonal relationships between political leaders are important. Separately, problems can arise when autonomous localised arrangements with unbridled powers “claim international legitimacy and approval for forceful actions that were not in fact envisaged” by the international community.¹²³ That said, the unlikelihood of complete abdication and unconditional devolution by States of either collective security or ICrimJ function to self-authorising regional organisations should assuage the fear and peril of subverting the existence of international organisations like the UN and ICC.¹²⁴

Separately, as there may be multiple responses to an international (or regional) crime, better cooperation and coordination will also be needed.¹²⁵ If regional solutions are to be accepted as alternative routes for ICL, burden sharing in the practice of ICL, as well as integration/coordination of actors under clear achievable goals may prove a prudent approach for the regionalisation of ICrimJ. Instead of being an independent solution for maintaining or restoring stability, regional alternatives are better understood as an

¹²¹ Gray, *supra* n.60, at 374 and 427.

¹²² In this regard, the inclusion of troops from non-ECOWAS countries in ECOMOG was thus a condition of the *Cotonou Peace Agreement* in Liberia, the eventual implementation of which was also significantly due to UN involvement.

¹²³ *Supplement to an Agenda For Peace: Position Paper Of The Secretary-General On The Occasion Of The Fiftieth Anniversary Of The United Nations*, UN doc. A/50/60 - S/1995/1, 3 January 1995, at para.80.

¹²⁴ While they have strengthened their competence and authority through treaties, Abass notes that regional organisations have nevertheless continued to reserve roles for the UN. Similarly, Gray notes that there has been a consistent commitment to the existing legal framework of Chapter VIII in all recent discussions about the role of regional organisations and their relationship with the UN. Abass, *supra* n.57, at 213; and Gray, *supra* n.60, at 426.

¹²⁵ The experience of peacekeeping efforts shows that if the full scope of an operation cannot be managed within a single chain of command and control (‘integrated operations’), the UN and other organisations should then closely coordinate their policies and actions (‘coordinated operations’). This also applies to situations when the UN precedes or follows a multinational, regional or bilateral effort (‘sequential operations’). Concurrent actions without any coordination (‘parallel operations’) should then be avoided. Challenges Project, *Meeting the Challenges of Peace Operations: Cooperation and Coordination* (Stockholm: Elanders Gotab, 2005), at 34.

extension of, yet not technically subordinate to,¹²⁶ the capabilities of the international community.¹²⁷ In this regard, given that regional regimes have played a significant role in upholding and protecting human rights, this interrelated field of international law can undoubtedly offer further lessons for the regionalisation of ICrimJ.

3.2 Advancing Human Rights in Southeast Asia

In response to the 1993 United Nations World Conference on Human Rights in Vienna,¹²⁸ the ASEAN Foreign Ministers issued a Joint Communiqué at the 26th ASEAN Ministerial Meeting declaring support for the Vienna Declaration and Programme of Action, and agreed that “ASEAN should also consider the establishment of an appropriate regional mechanism on human rights”.¹²⁹ Scholars generally consider this to be the official start of the ASEAN process towards a regional human rights body.¹³⁰ Major developments on an ASEAN human rights body then coincided with the creation of the ASEAN Charter. The Eminent Persons Group (EPG) tasked with drafting the Charter acknowledged the value of a regional human rights mechanism, and its recommendations were endorsed by the ASEAN Heads of State/Government.¹³¹ The ASEAN Charter, with an Article mandating the creation of an ASEAN human rights body, was adopted at the 13th ASEAN Summit in November 2007. The AICHR was subsequently established, and its Terms of Reference (TOR) was then adopted later at the 42nd ASEAN Ministerial Meeting in 2009.¹³²

¹²⁶ It is erroneous to strictly view regional organisations as subsidiaries of the UN as they are not constitutionally or structurally linked with each other.

¹²⁷ To ensure effectiveness, a report of the UN Secretary-General recommended establishing “an interlocking system of peacekeeping capacities” between the UN and relevant regional organisations. *In Larger Freedom: Towards Development, Security and Human Rights for All*, UN Doc. A/59/2005, 21 March 2005, at para.112.

¹²⁸ During the 1993 Vienna Conference, a Declaration and Programme of Action was adopted that emphasised “the need to consider the possibility of establishing regional and subregional arrangements for the promotion and protection of human rights where they do not already exist”. See *Vienna Declaration and Programme of Action*, UN doc. A/CONF.157/23 of 12 July 1993.

¹²⁹ ASEAN, *Joint Communiqué of the Twenty-Sixth ASEAN Ministerial Meeting*, Singapore, 23-24 July 1993.

¹³⁰ For example, see Hao Duy Phan, “The Evolution Towards an ASEAN Human Rights Body”, *Asia-Pacific Journal on Human Rights and the Law* 1 (2008): 1-12, at 3.

¹³¹ See *Cebu Declaration on the Blueprint of the ASEAN Charter*, 13 January 2007.

¹³² ASEAN Secretary-General Surin Pitsuwan hailed it as a crucial step towards the fulfilment of the two basic principles of democracy and human rights enshrined in the ASEAN Charter. See ASEAN Secretariat, *Another Step Forward for Regional Human Rights Cooperation*, Press Release, 20 July 2009.

The TOR has since been criticised for only giving the AICHR an advisory role to member States with no enforcement powers.¹³³ Nevertheless, Kelsall points out that the AICHR has the potential to not only define the parameters of discussions, but also to issue statements and findings that may prove to be important triggers for further discussion on human rights and catalysts for reform.¹³⁴ It may then also serve as a forum for civil society groups and human rights advocates to lobby and voice their concerns. Such an evolutionary approach is probably the most effective path to develop human rights norms and standards in Southeast Asia. The fact that all ten ASEAN governments committed to integrate human rights into their shared agenda, and agreed to create a human rights body with “overarching” powers to protect and promote human rights within the region is indeed already remarkable. It could be prudent to adopt a similar approach for the regionalisation of ICrimJ.

That said, it is noteworthy that while Article 2(i) of the ASEAN Charter creates a binding obligation for member States to “respect for fundamental freedoms, the promotion and protection of human rights, and the promotion and protection of social justice” and Article 14 stipulates that “ASEAN shall establish an ASEAN human rights body, Article 2(e) still stresses the “non-interference in the internal affairs of ASEAN Member States”.¹³⁵ Important for our discussion is also the acknowledgement that Southeast Asian countries were incentivised to establish their own regional human rights mechanism suited to local contexts and sensitivities. Although the Southeast Asian countries reaffirmed their support for the 1948 UDHR, it is noteworthy that the ASEAN leaders had met prior to the Vienna conference to discuss their doubts and concerns about the universality of human rights norms and standards.¹³⁶ Of specific concern was the priority placed by the universalist camp on civil and political rights over economic and social rights, in particular that the pursuit of personal freedoms was of greater importance than society’s stability and

¹³³ The TOR limits AICHR activities to the promotion of human rights, and only mandates that the Commission serve as a coordinating, consultative, advisory body for the ASEAN member States and Secretariat. It has little independence or authority to ensure that ASEAN countries comply with human rights obligations and norms.

¹³⁴ Michelle Kelsall, “The New ASEAN Intergovernmental Commission on Human Rights: Toothless Tiger or Tentative First Step?”, *Asia Pacific Issues* 90 (2009), at 2.

¹³⁵ See *ASEAN Charter*, 20 November 2007.

¹³⁶ The ‘Western’ notion of human rights was presented as individualistic and ill-suited for Asian societies, which prized communitarian beliefs and communal actions. Kelsall, *supra* n.134, at 2. For a discussion on whether the UDHR is based on Western precepts, see Stephen Marks, “From the ‘Single Confused Page’ to the ‘Decalogue for Six Billion Persons’: The Roots of the Universal Declaration of Human Rights in the French Revolution”, *Human Rights Quarterly* 20 (1998): 459–514.

prosperity.¹³⁷ This sparked off the ‘Asian values’ debate, which was promoted by political figures from the region to deflect international criticism and pressure on democracy and human rights practices.¹³⁸ It centred on the contention that social harmony took priority over individual rights in Asia.¹³⁹ As human rights were seen to be culturally specific,¹⁴⁰ the argument was that its language and regional implementation must be tailored to suit local contexts and sensitivities.¹⁴¹

From the ASEAN human rights journey, it is clear that cardinal ASEAN norms like sovereignty and non-interference in the internal affairs of member States remain strong.¹⁴² A practical lesson for the regionalisation of ICrimJ in Southeast Asia is then that small incremental gains, especially in shifting normative positions, must not be trivialised or dismissed as irrelevant. It is also instructive that ASEAN leaders met before the Vienna conference to formulate a common regional position, which rejected the universalist position. Building on the discussion in the previous section, an inherent question is then whether ASEAN must operate in sync with the ICC or may adopt its own mandate. A crucial lesson to glean from the implementation of human rights will then be how to ensure that the regional initiative complements rather than duplicates, or worse goes against, international efforts within the region.

¹³⁷ Many member States were also “not prepared to ratify the various international human rights treaties and conventions”. Maznah Mohamad, “Towards a Human Rights Regime in Southeast Asia: Charting the Course of State Commitment”, *Contemporary Southeast Asia* 24 (2002): 230-251, at 233.

¹³⁸ See Fareed Zakaria, “A conversation with Lee Kuan Yew”, *Foreign Affairs* 73(1994): 109–26; Mahathir bin Mohamad, “Western Modernism vs. Eastern Thought”, in Mahathir bin Mohamad and Shintaro Ishihara, *The Voice of Asia: Two Leaders Discuss the Coming Century* (New York: Kodansha International, 1996); and Mahathir bin Mohamad, *The Asian Value Debate* (Kuala Lumpur: Institute of Strategic and International Studies, 1997).

¹³⁹ For a discussion on the ‘Asian Values’ debate, see Anthony Langlois, *The Politics of Justice and Human Rights* (Cambridge: Cambridge University Press, 2001).

¹⁴⁰ Critics however highlight that there is also no single unified set of ‘Asian Values’, and that it has many definitions due to the different cultural backgrounds and arguments presented by its proponents.

¹⁴¹ In the post-September 11 security environment, Maznah notes that the divisiveness stemming from the “universalist versus relativist” debates has been displaced by the prioritisation of security over human rights. Maznah, *supra* n.137, at 231.

¹⁴² See discussion in Chapter 4.

3.2.1 Lessons from the Regional Implementation of Human Rights

Arguments that human values and rights vary because of culture have existed since the inception of universal human rights.¹⁴³ Anthropologists and non-Western governments have argued that cultural relativism¹⁴⁴ legitimises variations in human rights between different regions and countries.¹⁴⁵ That said, it is important to distinguish between the nature of human rights and international human rights law.¹⁴⁶ Whether human rights are morally universal or relative, it is ultimately due to concrete obligations in conventions, treaties or customary international law that they have binding force. Hence, it would be wrong to jump to the conclusion that there is or must be uniformity of human rights laws amongst States. Despite the expanding network and scope of human rights conventions, coupled with the greater acceptance of the *jus cogens* status of some rights, the reality is that human rights norms are broad, vague and imprecisely defined. Uniform interpretation and implementation of human rights treaties is near impossible, let alone universal acceptance.

It must also be appreciated that the international human rights legal framework is concerned with and has developed rules that balance human rights interests with requirements of society. Being an international approach, it is attuned to developments in international law and international society in general,¹⁴⁷ and interpreted according to the current standards and circumstances of each individual State and region. States are thus often able to freely interpret their concrete obligations due to the flexibility and ambiguity found within much of human rights law. This point is illustrated by the

¹⁴³ Cultural relativism was first raised by the American Anthropological Association (AAA), which argued that dignity, humanity and rights were culture specific, and there were no universal human rights. In 1947 the AAA rejected the draft Declaration of Human Rights as “a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America”. American Anthropological Association, “Statement on Human Rights”, *American Anthropologist* 49, No. 4 (1947): 539-543.

¹⁴⁴ Cultural relativism is the assertion that human values, far from being universal, vary a great deal according to different cultural perspectives. Some would apply this relativism to the promotion, protection, interpretation and application of human rights that could be interpreted differently within different cultural, ethnic and religious traditions. United Nations, “The Challenge of Human Rights and Cultural Diversity”, *United Nations Background Note*, at <http://www.un.org/rights/dpi1627e.htm>.

¹⁴⁵ During the Cold War, the division between the Capitalist and Communist blocs created a divide on human rights. The former championed civil and political rights, while the latter prized economic and social rights. The political nature of the ‘cultural’ question later continued in the Asian values debate.

¹⁴⁶ When speaking of human rights, a legal relationship is implied between an individual and the State. Human rights standards then provide a precise yet constantly evolving legal regime, which also provide remedies and cast obligations. Shestack notes that ‘rights’ can however describe a variety of legal relationships. See Jerome Shestack, “The Jurisprudence of Human Rights”, *Human Rights in International Law: Legal and Policy Issues*, ed. Theodor Meron (Oxford: Clarendon Press, 1984), 70.

¹⁴⁷ Robert McCorquodale, “Self Determination: A Human Rights Approach”, *International Comparative Law Quarterly* 43 (1994):857-885, at 871.

crime of genocide, which is not just part of customary international law,¹⁴⁸ but also covered by the first major human rights treaty. Under the 1948 Convention on the Prevention and Punishment of Genocide, the definition of genocide¹⁴⁹ is not only limiting because it refers to a restricted list (Art.II) that excludes political, economic or social groups,¹⁵⁰ but also ambiguous as there are difficulties defining terms even within the listed groups like ‘ethnicity’.¹⁵¹ Furthermore, the exact scope of the prohibitions remains unclear since the intent requirement is difficult to prove and satisfy.¹⁵² Although ‘intent to destroy’ does not mean the complete annihilation of the group, there is also no settled view as to how large a number it has to be.¹⁵³

Given the flexibility and ambiguity found within much of human rights law, while universality of human rights operates at a high level of abstraction, uniformity is seldom achieved at the level of interpretation, let alone enforcement. This relativity is compounded by the wide range of defensible implementations of those obligations, and the fact that implementation and enforcement of particular rights are dependent on

¹⁴⁸ In the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide Case, the ICJ ruled that “principles underlying the [genocide] Convention are principles which are recognised by civilized nations as binding on states, even without conventional obligations”. The ICJ has also recognised them as erga omnes and suggested that prohibitions on the international crime of genocide form jus cogens. See ICJ Rep. 1951, p.15, at p.23.

¹⁴⁹ Under the Convention, genocide is defined as the commission of one of several acts listed (a) through (e) “with an intent to destroy, in whole or in part, a national, ethnic, racial or religious group” (Art II), and is a crime regardless of whether it is committed in times of peace or war (Art I). See Convention on the Prevention and Punishment of the Crime of Genocide (1948).

¹⁵⁰ Several countries argued against the inclusion of such groups when the Genocide Convention was being drafted in 1948 because they were deemed to be too vague, as well as temporary and unstable. Some were concerned that the inclusion of political groups would allow the UN to interfere in the internal affairs of sovereign States. See Ervin Staub, *The Roots of Evil: The Origins of Genocide and Other Group Violence*. (Cambridge: Cambridge University Press, 2002), at p.8.

¹⁵¹ The ICTR stated that “the concepts of national, ethnic, racial and religious groups have been researched extensively and that, at present, there are no generally and internationally accepted precise definitions thereof”, while the ICTY held that “to attempt to define a national, ethnic or racial group today using objective and scientifically irreproachable criteria would be a perilous exercise”. See *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment and Sentence, 6 December 1999, at para.55; *Prosecutor v. Musema*, Case No. ICTR-96-13-I, Judgment and Sentence, 27 January 2000, at para.161; and *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Judgment, 14 December 1999, at para.70.

¹⁵² Despite wider definitions in other human rights instruments, state practice supports the proposition that the Convention’s limiting and ambiguous definition is custom. See Steven Ratner, Jason Abrams and James Bischoff, *Accountability for Human Rights Atrocities in International Law*, 3rd ed. (Oxford: Oxford University Press, 2009), at 42-44.

¹⁵³ The 1985 Genocide Study only notes that it implied a reasonably significant number relative to the whole group, or a significant section of a group such as its leadership. ICTY case law elaborates that for genocide to exist, the perpetrators must seek to destroy all or part of “a particular kind of human group”. See *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide prepared by Mr B Whitaker*, UN Doc. E/CN.4/Sub2/1985/6, 2 July 1985, at para.29; *Prosecutor v. Krstic*, Case No. IT-98-33, Trial Chamber, Judgment, 2 August 2001, at para.550; and *Prosecutor v. Stakic*, Case No. IT-97-24/1-T, Trial Chamber, Judgment, 31 July 2003, at para.521.

sovereign States.¹⁵⁴ It is evidenced by the way the universal human rights concept has been expanded and expressed in strikingly different structures, content and levels of development in the various regional systems.¹⁵⁵ The Americas, Europe, and Africa each has a human rights regime for its region,¹⁵⁶ with differing priorities (evidenced most clearly by the North-South divide), as well as distinct mechanisms and terms of references (including various margins of appreciation) – in order to ensure the acceptance and compliance of State Parties.

Regional human rights mechanisms are however not without their detractors, and various arguments were made against their establishment during the nascent stages of the international human rights regime. First, it was opined that human rights should be defined in global instruments and implemented by international institutions as they are universal in nature and belong to everyone. Second, concern existed that the development of regional arrangements may cause fragmentation and divert focus away from international instruments.¹⁵⁷ In this vein, there was fear that regional bodies would duplicate existing international efforts, or might create policies and procedures that contradict those of the UN thereby adversely affecting its work. The risk was that such human rights mechanism would insulate the region from external influences and promote indifference towards the standards and institutions of the international system. Separately, competition or conflict between different regional or sub-regional institutions could also erupt.¹⁵⁸

¹⁵⁴ Even though several rights in the International Human Rights Covenants involve specifications at the level of form, uniform implementation is impossible. For example, Article 10(2)(b) of the ICCPR requires the segregation of juvenile defendants. In some cultures, however, the very notion of a juvenile criminal defendant (or a penitentiary system) does not exist. Donnelly, *supra* n.36, at 97.

¹⁵⁵ Regional human rights systems generally involve a few States that are in close geographic proximity, and consist of: (1) a list or lists of internationally-guaranteed human rights; (2) permanent institutions; and (3) compliance or enforcement procedures. Dinah Shelton, “The Promise of Regional Human Rights Systems”, in Richard Pierre Claude and Burns Weston, eds., *Human Rights in the World Community – Issues and Action*, 3rd ed. (Philadelphia: University of Pennsylvania Press, 2006), at 355.

¹⁵⁶ Besides these major regional human rights systems, there is also a dormant Arab system and a nascent ASEAN mechanism. While some parts of the Arab Charter of Human Rights are inconsistent with international standards and it is unclear that the Arab Committee of Human Rights is sufficiently independent, the adopting of the Charter in 2004 and creation of the Committee in 2009 are themselves important steps forward.

¹⁵⁷ Before the ICCPR and ICESCR were adopted in 1966, regionalising human rights was unpopular at the UN as there was “a tendency to regard it as the expression of a breakaway movement, calling the universality of human rights into question”. Karel Vasak, *The International Dimensions of Human Rights*, Vol.2 (Westport: Greenwood Press, 1982), at 451. See brief discussion in Chapter 2 on the concern of the fragmentation of international law.

¹⁵⁸ See “Regional Promotion and Protection of Human Rights”, *Twenty-Eighth Report of the Commission to Study the Organization of Peace* (1980), at 15.

Over the decades since the UN human rights system was created, reticence against regional regimes has however receded partly due to problems achieving political consensus at the international level and the successful models in Europe and the Americas.¹⁵⁹ Furthermore, it has been shown that fears about regional systems are largely unfounded, and that regional divergence of views is not necessarily bad nor does it portend the demise of the universality of human rights.¹⁶⁰ On the contrary, both international and regional approaches have proven useful and complementary in promoting and protecting human rights because legitimate positive law gives rise to universal duties and obligations.¹⁶¹ As regional systems have elements of uniformity and diversity in their origins, they provide a credible framework to think universally in terms of normative concepts but act locally in terms of implementation and enforcement.¹⁶² Indeed, regional codes reinforce global human rights norms while addressing the particular problems in each region and accommodating the cultural, economic and political homogeneity of individual regions.¹⁶³

Regional arrangements also add in important ways to the knowledge derived from the UN and related conventions regarding possible avenues toward the protection and promotion of human rights.¹⁶⁴ For example, while the international system elucidated the minimum normative standard, regional mechanisms then took into account unique differences both between and within regions and went further by

¹⁵⁹ In 1977, the UN General Assembly acknowledged “the importance of encouraging regional cooperation for the promotion and protection of human rights and freedoms”, and requested the Secretary-General to organise “seminars for the purpose of discussing the usefulness and advisability of the establishment of regional commission” in regions where none existed. See UN General Assembly resolution 32/127, Regional Arrangements for the Promotion and Protection of Human Rights, UN Doc.A/RES/32/127, 16 December 1977.

¹⁶⁰ Shelton points out that regional systems have added new rights in a feedback process of mutual inspiration, but “in no case has a right been limited or withdrawn by a later instrument”. Shelton, *supra* n.155, at 360.

¹⁶¹ An EU report even asserts that regional human rights protection mechanisms “constitute the main pillars of the international system for the promotion and protection of human rights”. Policy Department Directorate-General for External Policies of the Union, *The Role of Regional Human Rights Mechanisms* (Brussels: European Parliament, 2010), at 5.

¹⁶² Regional systems have several advantages: (1) agreement on issues is more likely as States within regions may be relatively homogenous; (2) neighbouring States are more likely to comply with the agreed rights to avoid political repercussions; (3) fewer States are involved and achieving consensus is in theory more likely; and (4) regional systems are by definition more accessible as they are located in the same geographical area as the States concerned. Rhona Smith, “Regional Systems: An Overview”, in Rhona Smith and Christien van den Anker, eds., *Human Rights* (London: Hodder Arnold, 2005), at 307.

¹⁶³ Donnelly contends that “universal human rights do not require identical human rights practices” and that “substantial second-order variations, by country, region, or other grouping, are fully compatible with the relative universality of internationally recognised human rights”. Donnelly, *supra* n.36, at 49.

¹⁶⁴ Henry Steiner and Philip Alston, *International Human Rights in Context*, 2nd ed. (Oxford: Oxford University Press, 2000), at 779.

refining some of the rights and/or adding further rights.¹⁶⁵ It is noteworthy that the UNGA actively encouraged regional mechanisms, and even appealed to States in areas without such arrangements to create “within their respective regions of suitable regional machinery for the promotion and protection of human rights”.¹⁶⁶ The UN Office of the High Commissioner for Human Rights (OHCHR) has also emphasised the importance of regional mechanisms.¹⁶⁷ A key reason has been that the transfer of expert knowledge, exchange of experience, and sharing of best practices between UN and regional organisations can bring tangible benefits to both sets of entities.¹⁶⁸ Furthermore, cooperation with regional mechanisms can be crucial to following up on UN recommendations and decisions.¹⁶⁹ Regional arrangements thus advance the protection and promotion of human rights by increasing both awareness of the issues within the region through the embedding of local context, as well as State willingness to implement proposals if regional findings and reports support the suggestions contained in UN mission reports.

The ostensible dichotomy between universalism and relativism in human rights would therefore have been satisfactorily reconciled and resolved on a functional basis. Indeed, regional mechanisms reflect the norms set out in international declarations and conventions, and cross-reference with normative instruments and jurisprudence of other systems.¹⁷⁰ This indicates that analogous concerns about the regionalisation of ICrimJ can be tackled. Given similarities in both their underlying universality and practical challenges, the regional approach to international human rights law clearly proffers a judicious archetype for the regionalisation of ICrimJ. Despite the theoretical universality and consensus at the conceptual level regarding ICrimJ, it is conceivable that there could be different justifiable interpretations by

¹⁶⁵ An EU report notes that “regional human rights standards complement international ones by putting them in a local context”, and an effective regional mechanism is crucial for comprehensive human rights promotion and protection. See *The Role of Regional Human Rights Mechanisms*, supra n.161, at 6.

¹⁶⁶ See UNGA resolution 32/127, supra n.159.

¹⁶⁷ OHCHR has not only provided assistance for existing regional systems to improve their protection mechanisms, but also supported initiatives to establish systems in regions where none exist.

¹⁶⁸ Similarly, inter-regional collaboration can lead to benefits for the international system and regional regimes, as the cooperation and exchange of information may further develop regional protection of human rights.

¹⁶⁹ Cooperation between UN treaty bodies and regional mechanisms however often remains at a case-by-case and technical level. Increased cooperation and better coordination on a regular and institutional basis would lower the risk of thematic overlaps, and alleviate pressure from limited capacities and overstretched resources.

¹⁷⁰ Shelton notes that virtually all the legal instruments creating the various regional systems refer to the UN Charter and UDHR, and provide a measure of uniformity and reinforcement of the universal character of the UDHR. Shelton, supra n.155, at 359.

States on international crimes,¹⁷¹ or at least variations in regional priorities and focus.¹⁷²

Since cultural relativism and regional regimes have not led to the demise of the universality of human rights, but in fact play a role in advancing the international system, regional regimes may also be a useful way to approach the promotion of ICrimJ norms and varied enforcement of ICL. For example, due to the difficulties in developing a universally accepted system of human rights, a major way forward has then been to accept some degree of relativism through regional machinery that contain different guarantees and emphases, while working in tandem with the international system. Such regional initiatives include: (1) full-time regional human rights courts; (2) complaint mechanisms for judicial and quasi-judicial redress; and (3) systems and procedures facilitating on-site visits to study the human rights situations.¹⁷³ Similar mechanisms may prove applicable in different regional settings for promoting ICrimJ and enforcing ICL.¹⁷⁴

Two cautionary lessons can however also be gleaned from the experience of regional human rights mechanisms. Firstly, while they can positively influence and mutually reinforce the message of other regional institutions, divergent jurisprudence may dilute the human rights protection and risk creating conflicting State obligations. That said, this may be more a problem if institutional proliferation and divergence exists within a region, rather than at the international level or between different regions. Secondly, care must be taken for regional bodies not to become victims of their own success, particularly in terms of increasing caseloads without commensurate expansion of resources.¹⁷⁵ A possible solution is then to emphasise regional protection and enforcement mechanisms within the international agenda – whereby institutionalised collaboration is encouraged between the universal and regional mechanisms, and cooperation concurrently strengthened at the inter-regional level.

¹⁷¹ Domestic courts are thus as much creators as they are enforcers of international law. Anthea Roberts, “Comparative International Law? The Role of National Courts in Creating and Enforcing International Law”, *International and Comparative Law Quarterly* 60 (2011):57–92.

¹⁷² Institutional procedures and powers would also differ between regions. The scope, authority and procedures of regional human rights systems may in fact then diverge more than the conceptual rights being protected.

¹⁷³ Shelton, *supra* n.155, at 363-4.

¹⁷⁴ See discussion in Chapter 4 on possible regional ICrimJ mechanisms for Southeast Asia.

¹⁷⁵ For example, the European Court of Human Rights has a huge backlog of cases. While there has been some success in reducing the backlog of cases that are clearly inadmissible from over 100,000 in September 2011 to 38,200 in October 2013, the total number of pending cases still remains high at 111,350. Registrar of the Court, *Reform of the Court: Filtering of cases successful in reducing backlog*, Press Release, ECHR 312 (2013), 24 October 2013.

This could facilitate exchanges with the international systems and improves coordination amongst regional systems, and lessens unnecessary duplication of efforts and potential conflicts. Encouraging collaboration between international and regional mechanisms could also make support available for capacity building initiatives and help develop common functional and procedural aspects of regional systems.

In sum, regional regimes have played a significant role in upholding and protecting human rights, and there are obvious lessons for the regionalisation of ICrimJ. Besides specific advantages and disadvantages of regional action, it is also clearly important to consider how the operational relationship for enforcing ICL is structured between the international, regional, and domestic levels. The allocation of authority and jurisdiction in a system comprising of an international court, regional mechanisms, and sovereign States must be clear to avoid inefficiencies and duplication of efforts.¹⁷⁶ Various practical issues must be considered, including the previously highlighted issues of the complementarity regime of the ICC, double jeopardy, and exhaustion (or illusory nature/unavailability) of local remedies. In this regard, an elastic concept like subsidiarity may prove useful in terms of the distribution of duties and powers between the ICC and regional mechanisms,¹⁷⁷ as it can legitimise “both the expansion and restriction of authority by linking governance to the issue of competencies”.¹⁷⁸ Two different forms of decentralised control in such a tiered system of responsibilities may then be adopted. The first is burden-sharing, which revolves around the exchange of resources among authorities to develop a “cooperative and complementary division of labour” between various stakeholders to realise shared objectives.¹⁷⁹ On the other hand, burden shifting is an “abrogation of global responsibility” that devolves responsibility without considering the capacity of the affected region or States to respond effectively.¹⁸⁰ As surmised in the earlier discussion on collective security, burden-sharing may offer a prudent approach for the

¹⁷⁶ There should also be clarity in the process of obtaining State consent, and who can make a report or referral (affected States, any State, regional organisation, UN Security Council, or individuals).

¹⁷⁷ Subsidiarity implies the allocation of power in “a tiered governance system” that favours decentralised control. It connotes the exchange of resources between parties to achieve shared goals and the delegation of authority to act by a superior organ to an inferior one. See O'Brien, *supra* n.98, at 57.

¹⁷⁸ Knight adds that it gives those affected “a voice in building those arrangements that control their daily lives”, thus ensuring that they are not alienated from the initiatives meant to aid them. W. Andy Knight, “Towards a Subsidiarity Model for Peacemaking and Preventive Diplomacy: Making Chapter VIII of the UN Charter Operational”, *Third World Quarterly* 17 (1996):31-52, at 49.

¹⁷⁹ O'Brien, *supra* n.98, at 58.

¹⁸⁰ *Ibid*, at 59.

regionalisation of ICrimJ, as well as to consolidate and strengthen cooperation on ICL between international, regional and State actors.

3.3 Conclusion

While the norms of ICrimJ are relatively clear and there is theoretical universality and consensus concerning ICrimJ at the conceptual level, there remains an element of choice regarding the possible approaches to advance ICL and the mechanisms to enforce it. In this vein, regional cultural differences offer a defensible base for differing interpretations and hierarchies of ICL at the substantive level. Such regional divergence on substantive law and enforcement may not be bad or harmful to the universality of the normative concept. Rather, it can help advance the international system through the reinforcement of universal duties and obligations.

Regional initiatives on ICrimJ amongst a group of States that are in close geographic proximity may include: (1) a list or lists of internationally and regionally prohibited act; (2) permanent institutions or mechanisms mandated for ICL; and (3) enforcement or compliance procedures. As the political and strategic considerations for States to enforce ICL will differ greatly from one part of the world to another, it is however unwise to assert that there is only one best way to regionalise ICrimJ and pre-determine the exact relationship between regional mechanisms with the ICC and domestic courts. Indeed, the situational context will affect both normative and institutional choices and only general observations and recommendations are possible.

Firstly, while it is clear that regional organisations will depend on UN authorisation to undertake military action to arrest and bring to justice perpetrators of international crimes,¹⁸¹ they are not limited in terms of adopting non-kinetic measures to deter, stop and punish such individuals. In this regard, it is noteworthy that the possibility of a compatible and cooperative relationship between the ICC and a regional court is not closed off by the ICC Rome Statute.

Secondly, any efforts to regionalise ICrimJ should be based on institutional solutions that are realistic in their individual contexts. The chosen regional mechanism must ultimately be effective and operational, and it may therefore be prudent to use

¹⁸¹ Such authorisation could be akin to UN Security Council resolution 2098, which authorised UN peacekeepers to “support and work with the Government of the DRC to arrest and bring to justice those responsible for war crimes and crimes against humanity in the country, including through cooperation with States of the region and the ICC”. See Security Council resolution 2098 (2013), UN Doc. S/Res/2098(2013).

regional structures that are already present. That said, regional institutions should only be used if they are credible and can maintain both impartiality and support of regional States, as well as have the necessary infrastructure, resources and capacity. If none are present, the creation of an *ad hoc* regional institution with international support and participation may be a solution.¹⁸²

Thirdly, as there may be multiple responses to an international crime, a clear distribution of authority and coordination between international, regional and national legal mechanisms must be established. This should include explicit procedures regarding jurisdiction and cooperation. In this regard, an element of subsidiarity can exist within the process of regionalising ICrimJ to be accepted as an alternative route for ICL. Emphasising regional enforcement within the international agenda through burden sharing will then prove a sensible approach to avoid conflicts and duplication of efforts.

¹⁸² If existing regional organisations are unable to do the job, international support and participation for an *ad hoc institution* may be needed to provide much needed resources and experience, and possibly to overcome any political deadlock between regional States.

CHAPTER 4

A REGIONAL MECHANISM FOR SOUTHEAST ASIA

States have been and continue to be inherently unwilling to cede their sovereignty. In this regard, Chapter 2 notes that States had little incentive throughout the twentieth century to consider the regionalisation of ICrimJ as there was no threat posed by an international judicial organ that could prosecute their own citizens, particularly high-ranking government officials. The situation has however changed with the creation of the ICC, and States now have a reason to seek regional alternatives to prevent the ICC from exercising its jurisdiction. This objective of this chapter is to then determine the form(s) of a regional mechanism that would be most effective and realistic within the context of Southeast Asia. The region arguably deserves an indigenous ASEAN-based mechanism to promote ICrimJ. Given recent developments within the sub-regional organisation, especially the creation of the ASEAN Intergovernmental Commission on Human Rights (AICHR), this may not be as impossible as it may sound.¹ Furthermore, ASEAN Member States (AMS) have already had much experience in collectively addressing issues of criminal justice, and the region has even emerged as a leader in responses to transnational crimes like trafficking in persons.²

Yet, it is recognised that discussion about the plausibility of regionalising ICrimJ within Southeast Asia must unequivocally take into account ASEAN's history, geography, and trajectory.³ In the interest of maintaining regional peace in a less certain post-Cold War paradigm, AMS have become less uncomfortable about highlighting politically contentious issues, and begun to approach the sacrosanct principle of non-interference in a more pragmatic, open and flexible way.⁴ That said, the notion of state sovereignty and institutional considerations still weigh heavily on

¹ During the EU-ASEAN Ministerial Meeting in 2003, the ICC was noted to be a “positive development in the fight against impunity for crimes against humanity, war crimes and genocide”. See Joint Chairmen’s Statement at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/74270.pdf.

² Great strides have been made towards the ASEAN goal of ending impunity for traffickers and securing justice for victims of this crime. See ASEAN, *Progress Report on Criminal Justice Responses to Trafficking in Persons in the ASEAN Region* (Jakarta: ASEAN Secretariat, 2011).

³ Geography, geopolitics, and certain elements of the ICC Statute may thus influence the ratification decision of States. See Daragh McGreal, “A Rationalist View of Rome Statute Ratification in the Pacific Region”, *Journal of International Criminal Justice* 11 (2013): 1091-1109.

⁴ See Hiro Katsumata, “Why is ASEAN Diplomacy Changing?: From “Noninterference” to “Open and Frank Discussions””, *Asian Survey* 44 (2004): 237–54; and Timo Kivimäki, “Power, Interest or Culture: Is there a Paradigm that Explains ASEAN’s Political Role Best?”, *Pacific Review* 21 (2008): 431–50.

how ASEAN decisions are made.⁵ It is in this context that, despite the principle of complementarity only allowing the ICC to have jurisdiction when a State is proven to be unwilling or unable to investigate an alleged international crime,⁶ States are uneasy that determination of their “unwillingness” and “inability” rests completely with the Court.⁷ The idea of a regional initiative for ICrimJ thus has further political currency amongst the Southeast Asian countries that are not signatories to the Rome Statute.⁸ Given that absolute sovereignty over the prosecution of core international crimes that previously existed has been eroded with the establishment of the ICC, such mechanisms are not only more reflective of regional norms and legal practices, but will also allow the AMS to collectively reassert their national sovereignty on ICrimJ issues in the region.⁹

It must also be acknowledged that the ASEAN practices of accommodation and seeking consensus mean that the institution and its member States will probably try to avoid formal and adversarial forms of adjudication. The 'ASEAN way' of dealing with problems and difficult situations is based on the Javanese cultural practice of making decisions through consultation and consensus, thereby permitting AMS to retain sovereign control throughout the process.¹⁰ This approach takes into account that Southeast Asian nations are not homogenous in terms of language, religion, ethnic composition, cultural practices, political and legal systems, or economic development. It is also a recognition of the complex inter-State relationships, with varying degrees of shared (colonial) history and comfort with each other. If differences of opinion are too great and consensus on a difficult issue cannot be reached, the matter is shelved and no organisational position is adopted. This also means that ASEAN will normally adopt a position based on the lowest common

⁵ This is partly because ASEAN and its initiatives depend largely on the material and financial support of AMS.

⁶ See the Preamble, Article 1 and Articles 17-19, ICC Statute.

⁷ Allowing the ICC to investigate and prosecute individuals without the consent of their States then makes complementarity “the largest stumbling block for Asian states’ participation in the ICC”. Amrita Kapur, “Asian Value v. The Paper Tiger: Dismantling the Threat to Asian Values Posed by the International Criminal Court”, *Journal of International Criminal Justice* 11 (2013): 1059-1090, at 1059.

⁸ Of the 10 countries that constitute the Association of Southeast Asian Nations (ASEAN), only Cambodia (in 2002) and the Philippines (in 2011) have ratified the Rome Statute.

⁹ It is however recognised that Southeast Asia is unlikely to be a focus of the Court in the near future.

¹⁰ The ASEAN style of decision making focuses on building consensus through a process of extensive consultations. See Amitav Acharya, “Collective Identity and Conflict Management in Southeast Asia”, in Emanuel Adler and Michael Barnett, eds., *Security Communities* (Cambridge: Cambridge University Press, 1998), at 211-121; and Mely Caballero-Anthony, *Regional Security in Southeast Asia: Beyond the ASEAN Way* (Singapore: Institute of Southeast Asian Studies, 2005), at 72-76.

denominator that all member States can unanimously agree on. The practical effect of both these two sets of decision making approaches is that the organisation remains unified.¹¹

The 'ASEAN way' is also characterised by the avoidance of the use of force through informal and non-official means.¹² Weatherbee highlights that there is however no formal approach to collective security within ASEAN.¹³ Indeed, no collective security treaty exists,¹⁴ and the organisation has always avoided going down that path.¹⁵ The ASEAN Charter, which entered into force on 15 December 2008, codifies all ASEAN norms, rules, and values,¹⁶ and will help "determine the functions, develop areas of competence of key ASEAN bodies and their relationship with one another in the overall ASEAN structure".¹⁷ Hence, while political and security cooperation within ASEAN now also includes elements of post-conflict peace-building,¹⁸ no enforcement mechanisms are in place to deal with breaches of the principles and goals relating to regional security.¹⁹ The informal approach entails (and arguably strengthens) the close interpersonal links at the levels of government leaders

¹¹ A former ASEAN Secretary-General said that if there was something ASEAN cannot resolve, "it may put the problem under the carpet". Narine thus notes that AMS will "agree to disagree, go their separate ways, and maintain ... the illusion of ASEAN unity". See Quote in Amitav Acharya, "Culture, Security, Multilateralism: The 'ASEAN Way' and Regional Order", *Contemporary Security Policy* 19 (1998): 55-84 at 62; and Shaun Narine, "ASEAN and the Management of Regional Security", *Pacific Affairs* 71 (1998):195-214, at 195.

¹² By addressing dangerously contentious issues through informal modes of dispute avoidance and resolution, AMS can avoid adopting formal positions and using confrontational references. Hilaire McCoubrey and Justin Morris, *Regional Peacekeeping in the post-Cold War Era* (The Hague: Kluwer Law International, 2000), at 160.

¹³ See Donald Weatherbee, "ASEAN Regionalism: The Salient Dimension", in Karl Jackson and M Hadi Sosastro, eds., *ASEAN Security and Economic Development* (Berkeley: University of California, 1984).

¹⁴ ASEAN's founding document, the Bangkok Declaration, is devoid of any reference to either collective security or collective defence. McCoubrey and Morris argue that this is due to an aversion to the "possibly threatening or destabilising discussion of 'security' concepts", and a recognition different and broader concepts of security in the region. McCoubrey, *supra* n.12, at 161-162.

¹⁵ Instead of formal or legally-binding security alliances, ASEAN adopts the practice of consultation and consensus to deal with defence issues. This continues to be true even with the creation of the ASEAN Defence Ministers Meeting (ADMM) in 2006. See David Jones and Michael Smith, "Making Process, Not Progress: ASEAN and the Evolving East Asian Regional Order", *International Security* 32 (2007):148-184, at 155.

¹⁶ Most crucially, it reiterates respect for ASEAN principles like sovereignty and non-interference in the internal affairs of member States. See Article 2, ASEAN Charter.

¹⁷ See 2005 Kuala Lumpur Declaration on the Establishment of the ASEAN Charter, 12 December 2005.

¹⁸ See Annex 1, *2004 Vientiane Action Programme*, 29 November 2004.

¹⁹ The norms and values of ASEAN do not differ much in terms of content, but what distinguishes it is the way they are implemented and enforced. Acharya notes that the uniqueness of ASEAN lies primarily in "the process through which such interactions are carried out". Amitav Acharya, "Ideas, Identity, and Institution Building from the 'ASEAN Way' to the 'Asia-Pacific Way?'" , *The Pacific Review* 10 (1997): 319-346, at 329.

and senior officials,²⁰ while unofficial mechanisms to obliquely address contentious issues include low-level confidence building measures – like non-binding dialogue sessions, non-confrontational ‘workshops’, and ‘track two’ bilateral/multilateral forums.

The orientation and role of ASEAN thus differs dramatically from other, especially western, regional groupings in its lack of emphasis on formal rules, legal obligations and enforcement mechanisms.²¹ This is largely a function of the fact that decision-making and problem-solving among AMS are based on personal relations instead of institutional frameworks.²² In this regard, Thio highlights that ASEAN’s policy of constructive engagement not only seeks to induce change through peer pressure, but also tries “not to embarrass the object of engagement through isolation or condemnation”.²³ For example, conflict prevention and resolution in Southeast Asia are achieved through closed-door discussions and discrete political intervention at the sidelines of meetings, which specifically avoid the need for governments to adopt public positions or go through legalistic procedures that may limit their policy options.²⁴ This is a crucial point to note for those arguing that hard law must be paramount in upholding ICrimJ.

Acceptance and progress amongst AMS are indeed more likely to be attained through informal processes of consultation and dialogue, as well as mediation between affected parties. Jørgensen-Dahl argues that ASEAN has served “a useful purpose by providing a framework within which the parties could discuss their differences in a ‘neutral’ atmosphere”.²⁵ The multilateral framework enables Parties to a conflict to remain in contact, when normal bilateral channels or communication have been severed or no longer function properly. The informal, consensus-driven, trust-

²⁰ Pathmanathan notes that AMS rely on “discussion and accommodation at high political levels” to settle their disputes. Murugesu Pathmanathan, *The Pacific Settlement of Disputes in Regional Organisations: A Comparative Perspective of the OAS, OAU and ASEAN* (Kuala Lumpur: University of Malaya, 1978), at 20.

²¹ Busse contends that the “social practice and political interaction” amongst AMS not only fostered a shared regional identity, but also created a distinctive “political culture”. Nikolas Busse, “Constructivism and Southeast Asian Security”, *Pacific Review* 12 (1999): 39-60, at 59.

²² Thio Li-ann, “Implementing Human Rights in ASEAN Countries: Promises to Keep and Miles to Go Before I Sleep”, *Yale Human Rights & Development Journal* 2 (1999):1-86, at 78-79.

²³ *Ibid*, at 45.

²⁴ Acharya opines that ASEAN processes contrasts with the “adversarial posturing” and “legalistic decision-making procedures” often found in international negotiations. See Acharya, *supra* n.19, at 329; and Amitav Acharya, *Constructing a Security Community in Southeast Asia* (London: Routledge, 2001), at 64.

²⁵ By steadily increasing the scope and range of ASEAN activities, Jørgensen-Dahl adds that it also made member States more aware of each other’s problems, and therefore better facilitated comprises. Arnfinn Jørgensen-Dahl, “The Significance of ASEAN”, *World Review* 19 (1980): 55-59, at 56-57.

building formula adopted by ASEAN has thus not only proven to be highly effective in managing thorny issues,²⁶ but also forged a sense of collective solidarity amongst the countries of Southeast Asia. AMS may therefore hesitate to ratify the ICC Statute if they risk being required to arrest and surrender another ASEAN leader for whom arrest warrants have been issued,²⁷ as it would greatly reduce their ability to maintain diplomatic engagement and deliver political solutions.

The ASEAN norms can similarly be expected to affect the creation of any regional ICrimJ mechanism. Like the humanitarian assistance/disaster relief (HADR) and peace support projects by ASEAN,²⁸ ICrimJ initiatives in Southeast Asia will have to take into account regional political and practical realities, as well as personal dynamics amongst State leaders. As a corollary, they have to prioritise the intended functions of ICL (such as punishment, deterrence, incapacitation, rehabilitation, and post-conflict reconciliation) according to State and regional interests. Furthermore, any effort to regionalise ICrimJ must not only be deemed fair and just, but must also reconcile moral and legal canons with concerns about the (actual or perceived) imposition of foreign norms and values.²⁹ Constructing an appropriate regional ICrimJ mechanism in Southeast Asia must therefore be done from the highly cautious and restrictive perspective of ASEAN and its member States. This is particularly true if any enforcement capabilities by the regional community are envisaged.

Before embarking on an assessment of alternative forms for an ASEAN regional mechanism for ICrimJ, it may be worthwhile to recall some of the key issues of concern amongst non-party states towards the ICC. Firstly, there is apprehension that political and military leaders could be exposed to politically motivated accusations. The fact that the ICC cannot try an individual for a crime that occurred before the Rome Statute enters into force does ameliorate the fear that members of the current and recent ruling elite will be tried for their past actions.³⁰ However, it greatly

²⁶ ASEAN's dispute resolution mechanisms, such as the ASEAN High Council and TAC, have hardly ever been utilised. McCoubrey, *supra* n.12, at 160.

²⁷ Article 59(1), ICC Statute.

²⁸ AMS adopted an ASEAN Agreement on Disaster Management and Emergency Response in 2005, and created the ASEAN Coordinating Centre for Humanitarian Assistance on Disaster Management in 2011.

²⁹ 'Parachuting' foreign concepts and structures into Southeast Asia risks establishing institutions, agreements and processes that are irrelevant to AMS. Nicola Baker and Leonard Sebastian, "The problem with parachuting: Strategic studies and security in the Asia/Pacific Region", *Journal of Strategic Studies* 18 (1995): 15-31.

³⁰ The Court may exercise jurisdiction only with respect to crimes committed after a State becomes Party to the ICC Statute. See Article 11(2), ICC Statute.

increases the burden of accountability for defence officials and military planners responding to both intra-state and inter-state conflict situations. Countries with significant defence interests and influential military institutions may therefore push strongly against ICC membership.³¹ As the ICC is “most likely to prosecute crimes associated with civil wars”,³² the costs of ratification are notably also higher for States where separatist elements or internal tensions between political, ethnic or religious factions still exist. While Article 14 of the ICC Statute allows State Parties to refer a situation that occurred in its territory to the Prosecutor,³³ they are unable to direct the focus only on non-government or opposing factions.³⁴ In this regard, it may be politically prudent to avoid ICC involvement and domestically prosecute previous governments or non-state actors for their roles in alleged crimes.³⁵

Secondly, this concern was bolstered by pressure from the US to reject the ICC. With the passing of the American Servicemembers’ Protection Act (ASPA) that advocated the withholding of military assistance to countries that ratify Rome Statute, many allies were forced to weigh the intangible value of ICC membership against substantial and concrete US military and financial aid.³⁶ As part of its “integrated approach” to ICrimJ,³⁷ the Obama Administration “respects the right of every country to join the ICC”,³⁸ and has stated its own intention to cooperate with the ICC.³⁹

³¹ For example, fearing that border clashes could result in its military personnel being brought to trial at the instigation of Myanmar, the Thai defence ministry prevented the ratification of the Rome Statute by Thailand. See Xinhua News Agency, 6 June 2002, “Thai Defense Ministry against entry into International Criminal Court”.

³² Beth Simmons and Allison Danner, “Credible Commitments and the International Criminal Court”, *International Organization* 64 (2010): 225-256, at 238.

³³ See Articles 14, 13(a) and 12(2)(a), ICC Statute.

³⁴ McGreal notes that a State “cannot refer a situation within its borders without its own actions also potentially being investigated”. McGreal, *supra* n.3, at 1102.

³⁵ For example, after the killing of civilian opposition protestors in 2010 by Thai security forces, former-Thai PM Abhisit Vejjajiva was indicted for murder in December 2013. Given that the government was then led by Yingluck Shinawatra, the sister of previous-PM Thaksin Shinawatra whom he deposed, Abhisit has described the allegations against him as politically motivated.

³⁶ A correlation was found between States likely to ratify the ICC Statute, and those likely to sign an agreement with the US preventing military personnel and subcontractors from arrest and surrender to the ICC. Simmons, *supra* n.32, at 245.

³⁷ Harold Koh, “The Challenges and Future of International Justice”, Panel Discussion at NYU Center For Global Affairs, 27 October 2010, at <http://www.state.gov/s/l/releases/remarks/150497.htm>.

³⁸ See Stephen Rapp, “Where Can the Victims of Atrocities Find Justice?”, 10 May 2011, at http://www.state.gov/j/gcj/us_releases/remarks/2011/165257.htm.

³⁹ **This includes** pursuing a policy of ‘positive engagement’ with the ICC, such as: (1) participating as an observer at the ICC Assembly of States Parties; and (2) engaging with ICC State Parties on issues of concern and “supporting the ICC’s prosecution of those cases that advance US interests and values”. See US White House, *National Security Strategy*, May 2010, at 48.

Although the US has ceased its harsh rhetoric and hostility towards the Court,⁴⁰ and arguably supported its work in the DRC,⁴¹ two major issues remain. **First**, the US does not intend to ratify the Rome Statute in the “foreseeable future”.⁴² US Ambassador at Large for War Crimes, Stephen Rapp, cited concerns that US officials would be unfairly prosecuted and the strong domestic court system in the US as reasons preventing ratification.⁴³ In March 2011, the US also rejected recommendations in the UN Human Rights Council’s Universal Periodic Review that it ratify the Rome Statute.⁴⁴ **Second**, even though the US expanded its War Crimes Rewards Programme (WCRP)⁴⁵ to include any foreign national accused of genocide, war crimes or crimes against humanity by any international (including mixed or hybrid) criminal tribunal,⁴⁶ there are no proposed legislation or plans for changes to US statutes and practices that are hostile to the ICC.⁴⁷ While the US Congress has repealed legislation punishing other States for refusing to sign bilateral immunity agreements (BIAs), there are no known efforts to rescind any existing ones.⁴⁸ Unless these positions change, some countries may still never accept or fully support the

⁴⁰ See Stephen Rapp, “Speech to Assembly of States Parties”, 19 November 2009, at http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/Statements/ICC-ASP-ASP8-GenDeba-USA-ENG.pdf; and US Department of State, “US Engagement with The International Criminal Court and The Outcome of The Recently Concluded Review Conference”, 15 June 2010, at <http://geneva.usmission.gov/2010/06/15/u-s-engagement-with-the-icc/>.

⁴¹ In 2013, the US handed indicted war criminal Bosco Ntaganda over to the ICC after he walked in and surrendered to its Embassy in Kigali, Rwanda. However, it is noteworthy that the US merely facilitated Ntaganda’s request to be transferred to the ICC.

⁴² Jaclyn Belczyk, “US war crimes ambassador says US unlikely to join ICC in ‘foreseeable future’”, *Jurist*, 28 January 2010, at <http://jurist.law.pitt.edu/paperchase/2010/01/us-war-crimes-ambassador-says-us.php>.

⁴³ *Ibid.*

⁴⁴ UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review—United States of America: Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*, UN Doc. A/HRC/16/11/Add.1, 8 March 2011.

⁴⁵ Before the expansion by US legislation signed on 15 January 2013, the WCRP was limited to persons indicted by the SCSL, ICTY and ICTR. See “War Crimes Rewards Program” at www.state.gov/j/gcj/wcrp/index.htm.

⁴⁶ The US Department of Justice provided a legal opinion in January 2010 that US diplomatic or “informational” support for ICC investigations or prosecutions would not violate domestic law. See US Department of Justice, “Memorandum for Mary DeRosa, Legal Advisor, National Security Council, Re: Engagement with the International Criminal Court,” 15 January 2010; and Congressional Research Service, “International Criminal Court Cases in Africa: Status and Policy Issues”, 7 March 2011, at 4.

⁴⁷ While then-US Secretary of State Hillary Clinton ostensibly expressed “great regret” in 2009 that the US had not ratified the Rome Statute, others like the US Defence Department have long argued that the ICC could be used to unfairly target US military personnel for alleged war crimes. As long as a divide remains within the US administration and Congress regarding the ICC, the US is unlikely to become a State Party. See “Clinton: It is a ‘great regret’ the US is not in International Criminal Court”, *The Guardian*, 6 August 2009, at www.theguardian.com/world/2009/aug/06/us-international-criminal-court.

⁴⁸ For a discussion on the compatibility of the BIAs with Article 98 of the ICC Statute, see Markus Benzing, “US Bilateral Non-Surrender Agreements and Article 98 of the Statute of the International Criminal Court: An Exercise in the Law of Treaties”, *Max Planck United Nations Yearbook* 8 (2004): 181-236.

ICC.⁴⁹ In this connection, it is important to note that peace and security in Southeast Asia is underpinned by continued US interest and presence in the region, as a counterweight to the increasing assertiveness and growing strength of China both militarily and economically.⁵⁰ As long as the US remains disinclined to accept ICC jurisdiction over its troops advising on or performing military operations, AMS will have an added disincentive to not ratify the Rome Statute.⁵¹

Instead of an outright rejection of the ICC or scepticism over its effectiveness,⁵² another position adopted by non-member States has been to ‘wait-and-see’. This is sometimes the result of a third set of considerations surrounding the practical difficulties in implementing ICrimJ based on extra-regional standards that are vastly different from the local realities.⁵³ These include the need for constitutional amendments, or changes to the judicial system and domestic laws,⁵⁴ as well as to incorporate the core international crimes enshrined in the Rome Statute.⁵⁵ Hence, Indonesia indicated a need to reform its judicial system before it would consider ratifying the Rome Statute, adding that there was no impetus to act when nations like the US, China, Russia, and India had yet to do so.⁵⁶ Similarly, other ASEAN countries have noted that a review of current criminal codes and sentencing regimes was also required, particularly in jurisdictions where capital punishment still exists because the most severe punishment permitted under the Rome Statute is life imprisonment.

⁴⁹ A senior Singaporean diplomat, eminent international lawyer and law professor hinted to the author that support for the ICC by various countries was effectively prevented by the actions of the past US administration.

⁵⁰ The US and China are not party to the ICC and their positions are unlikely to change in the near future.

⁵¹ Although it ratified the Rome Statute in 2011, the Philippines (along with Brunei, Cambodia, Laos, Singapore and Thailand) had also signed bilateral immunity agreements (BIA) with the US. These “Article 98” agreements still prevent current/former US officials, military personnel, and citizens from being transferred to the ICC.

⁵² The view that it is either irrelevant or inappropriate to deal with regional matters may explain the lack of enthusiasm for the ICC within the Asia-Pacific. Steven Freeland, “International Criminal Justice in the Asia-Pacific Region: The Role of the International Criminal Court Treaty Regime”, *Journal of International Criminal Justice* 11 (2013):1029-1057, at 1035.

⁵³ Nothing however suggests that AMS are reluctant to ratify the ICC Statute because of the substantive crimes covered by the court, or “discrepancies between the text and customary international law obligations”. Kapur, *supra* n.7, at 1070.

⁵⁴ There are also resource-related issues regarding the drafting of appropriate implementing legislation and enforcement within domestic criminal systems. Freeland, *supra* n.52, at 1051.

⁵⁵ This is an issue for developing States with laws yet aligned to international standards. See Ahmed Ziauddin and Xaynari Chanthala, “Strengthening the Process of Signing, Ratifying, Implementing and Monitoring International Legal Instruments in the Lao PDR”, Consultancy to Assist in the Enhancing Capacity of the Government of the Lao PDR in its Preparations for Accession to the Rome Statute of the International Criminal Court (2005), at http://www.er.uqam.ca/nobel/cedimbb/files/Laos_ICC_ConsultancyReport20June05.pdf.

⁵⁶ See Jakarta Post, 30 November 2002, “RI defers signing ICC Statute”, at <http://m.thejakartapost.com/news/2002/11/30/ri-defers-signing-icc-statute.html>.

Although the ICC Statute states that it is non-prejudicial to national application of penalties prescribed by their national laws,⁵⁷ the difficulty arises from the effect it can have on domestic trials and sentencing regimes, which may face legal and constitutional challenges if there is a lack of sentencing parity.⁵⁸

In assessing the dominant reservations withholding non-party Southeast Asian states from endorsing the ICC, Toon however discerns that while there may be some considerations relating to American influence and practical difficulties in implementation, the primary driving force was the shared obsession amongst the region grouping with preservation of state sovereignty and regime sustenance.⁵⁹ Kapur similarly contends that legal and political trends in Southeast Asia suggest that the threat perception of the ICC is more important than its efficacy in determining acceptance of the Court among AMS.⁶⁰ The fact remains that an underlying tension remains between the normative interest of ICrimJ in preventing impunity and the (political and practical) self-interests of States.⁶¹ Before the countries in Southeast Asia can seriously consider a regional court, commission, or treaty focused on ICL, their stakeholders must be gradually convinced that upholding ICrimJ has practical benefits,⁶² or be faced with some form of moral shock (such as another genocide in the region). It is worth recalling that the past Khmer Rouge massacres now hardly spark any interest within ASEAN about international crimes, while the Cambodian Tribunal itself has not necessarily improved the situation or attitudes towards ICrimJ in Cambodia, let alone in the region.⁶³ The imposition of foreign systems and universal norms of justice has even been negatively seen by some Cambodians “as an expression of contempt for their own traditions”.⁶⁴

⁵⁷ Article 80, ICC Statute.

⁵⁸ This may be viewed as a backdoor to force non-abolitionist States to amend their penal regimes.

⁵⁹ Valeriane Toon, “International Criminal Court: Reservations of Non-State Parties in Southeast Asia”, *Contemporary Southeast Asia* 26 (2004): 218–32, at 225.

⁶⁰ Kapur, *supra* n.7, at 1090.

⁶¹ The decision to ratify the ICC Statute thus “remains one that each state must consider as part of its own sovereign rights”. Freeland, *supra* n.52, at 1056.

⁶² Some argue the dearth of support in Asia is simply due to the lack of political will. Toon, *supra* n.59, at 225.

⁶³ This is partly due to the difference between local expectations of the ECCC and international notions of justice, rights and fairness. Moreover, the ECCC has been recognised to epitomise all the worst features of an internationalised criminal court, and generally rejected as a model for replication. See discussion in Chapter 1.

⁶⁴ Ian Harris, “Onslaught on Beings: A Theravada Buddhist Perspective on Accountability for Crimes Committed in the Democratic Kampuchea Period”, in Jaya Ramji and Beth Van Schaack, eds., *Bringing the Khmer Rouge to Justice: Prosecuting Mass Violence Before the Cambodian Courts* (New York: Edwin Mellen Press, 2005), at 80.

It is thus crucial to acknowledge local conditions, indigenous value systems, as well as the validity of regional conceptions of justice and mechanisms of accountability. Indeed, Singapore stated during the 1998 UN Diplomatic Conference of Plenipotentiaries that while some acts were so universally abhorred that their perpetrators should not escape punishment, “account must be taken of the diversity of regional interests, different stages of development and social and cultural traditions”.⁶⁵ This point has more recently been reiterated by ICC Assembly of States Parties (ASP), which highlighted the need to take into account the different “cultural traditions and sensitivities” of victims and witnesses.⁶⁶

To both serve the interests of ICrimJ and ensure that States will abide by it, the hierarchy of functions of ICL determined by a region must then also coincide with the regional approach that is adopted (formal trials, non-penal methods, or some combination of both). The chapter thus proceeds by considering whether the present ICrimJ system encapsulates any universally accepted penological principles or a hierarchical structure in terms of the intended purposes of ICL that must be adopted in the regionalisation of ICrimJ. Given that ICL is predominantly based on Western legal precepts of retributive justice and punishment, the chapter also deliberates whether a strict and formalistic conception of ICrimJ will overlook the fact that States respond differently to various legal, political and economic pressures. The underlying question is then if an over-emphasis on criminal trials will not only mask the political undercurrents that foster the mass violence of core international crimes, but also unwittingly overlook the extra-legal elements required for the restoration of peace and security. It cannot be overstated that much also depends on the context and availability of necessary resources. Simply transferring solutions from one context to another is no guarantee of success,⁶⁷ while blindly imposing externally developed models or ready-made solutions will certainly lead to disaster.⁶⁸ Retributive justice and criminal trials

⁶⁵ Statement by Lionel Yee (Singapore), UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 16 June 1998. See UN doc. A/CONF.183/13 (Vol.II), at 82.

⁶⁶ See ASP resolution, ICC-ASP/9/Res.3, 10 December 2010, at para.46.

⁶⁷ Kleffner stresses that there is no ‘one size fits all’ recipe for achieving peace in societies embroiled in inter-State or intra-State conflicts. Jann Kleffner, “Introduction”, in Carsten Stahn and Jann Kleffner, eds., *Jus Post Bellum: Towards a Law of Transition From Conflict to Peace* (The Hague: TMC Asser, 2008), at 2.

⁶⁸ Given the absence of a panacea for dealing with massive and systemic abuse, Freeman and Djukić remind us that each society must then choose its own most appropriate path. Mark Freeman and Dražan Djukić, “The Relevance of *Jus Post Bellum*: A Practitioner’s Perspective”, in Carsten

may thus not always effectively sanction and deter atrocity, let alone promote peace and security.⁶⁹

4.1 The Appropriate Form(s) for a Regional Approach

As previously discussed, the modern ICrimJ system circumscribes State sovereignty and immunity by establishing direct individual criminal liability. This is broadly justified on the twin ICrimJ goals of preserving international peace and stability, as well as protecting people against atrocities.⁷⁰ Its legitimacy is, however, derived from the ability to serve the normative goal of providing justice expected by the international community and victims of international crimes. In this regard, ICrimJ mechanisms must reconcile moral and legal canons with political and practical realities, while at all times also be considered fair and just. The functions of ICL may thus be prioritised both normatively and practically according to State and regional interests,⁷¹ and be based on retributive justice, restorative justice, or a mixture of the two.⁷² As ICrimJ must ultimately “seek to establish a long-lasting and sustainable peace”,⁷³ a strict policy of criminal accountability may not always be the best option and necessarily sacrosanct.⁷⁴ Indeed, given the concern of the affected State and its

Stahn and Jann Kleffner, eds., *Jus Post Bellum: Towards a Law of Transition From Conflict to Peace* (The Hague: TMC Asser, 2008), at 218-9.

⁶⁹ Clark contends that institutions like the ICC should not be over-relied upon to deliver peace or justice, and criminal trials must be part of a larger strategy combining retributive and restorative elements. Janine Clark, “Peace, Justice and the International Criminal Court: Limitations and Possibilities”, *Journal of International Criminal Justice* 9 (2011): 521-545, at 522.

⁷⁰ See discussion in Chapter 1.

⁷¹ These may include punishment, deterrence, incapacitation and denunciation, rehabilitation and re-education, post-conflict reconciliation and ‘truth’ finding, and addressing the needs of victims and affected communities.

⁷² The retributive approach is focused on what should be done to the offender, and justice is achieved by taming vengeance and placing the powers of blame and punishment in the hands of a court guided by the rule of law. On the other hand, the restorative approach is focused on the victim, and justice is done by repairing the harm done. Findlay and Henham thus note that while formal legal processes focus on the theoretical drivers of justice, less formal ICJ paradigms are based on the actual expectations of transitional States and their victim communities. Mark Findlay and Ralph Henham, *Transforming International Criminal Justice: Retributive and Restorative Justice in the Trial Process* (Devon: Willan Publishing, 2005), at xv.

⁷³ Mireille Delmas-Marty, “Ambiguities and Lacunae: The International Criminal Court Ten Years on”, *Journal of International Criminal Justice* 11 (2013): 553-561, at 557.

⁷⁴ Indeed, it is implied in Article 16 of the Rome Statute that situations exist where the demands of peace need or justify the (at least temporary) deferral of an investigation or prosecution by the ICC. Several scholars have noted that its purpose was to allow the UNSC “to set aside the demands of justice at a time when it considered the demands of peace to be overriding; if the suspension of legal proceedings against a leader will allow a peace treaty to be concluded, precedence should be given to peace”. Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, 2nd ed. (Cambridge: Cambridge University Press, 2011), at 170.

regional neighbours that such action may rupture any nascent and fragile peace, other extra-legal options should also be considered to achieve the twin goals of ICrimJ.⁷⁵ On the other hand, criminal prosecution and sanctions may be a crucial facet of a regional ICrimJ mechanism, particularly if States are seeking regional avenues to prevent the ICC from exercising its jurisdiction. The next two sections therefore examine the rationale for criminal prosecutions and penal sanctions, and discern whether less formal approaches to accountability and non-penal methods can effectively serve both the interests of ICrimJ and the States that will enforce it.⁷⁶

4.1.1 The Rationale for Criminal Prosecutions and Penal Sanctions

Criminal prosecutions and penal sanctions are presently the main accountability mechanisms for upholding ICrimJ and enforcing ICL. In this regard, retribution and deterrence have presented the international community with the most readily acceptable justifications to generate a response to international crimes.⁷⁷ Retribution has been a prime rationale for individual criminal liability for core international crimes since WWII.⁷⁸ It seeks to rectify the moral balance by punishing the perpetrator, but only to the extent that is proportionate to the gravity of the offence.⁷⁹

⁷⁵ This is particularly pertinent since the ICC Prosecutor recognises that the interests of justice do not “embrace all issues related to peace and security”, and stresses that “the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions”. See ICC Office of the Prosecutor, *Policy Paper on the Interests of Justice*, September 2007, at 8-9.

⁷⁶ Findlay and Henham posit that the formal and informal nature and context of these procedures then respectively reflect the “retributive and restorative aspirations for penalty and reconciliation”. Findlay, *supra* n.72, at xiv.

⁷⁷ The ICTY noted in the *Erdemović* case that the purposes and functions sought by the post-WWII tribunals indicated “an inclination towards general deterrence and retribution”, and held in the *Furundžija* case that it was “not only right that *punitur quia peccatur* (the individual must be punished because he broke the law) but also *punitur ne peccatur* (he must be punished so that he and others will no longer break the law)” and reiterated that “two important functions of the punishment are retribution and deterrence”. The ICTR likewise consistently recognised retribution and deterrence as the main basis for punishments. See *Prosecutor v. Erdemović*, Case No. IT-96-22-T, Trial Chamber, Sentencing Judgment, 29 November 1996, at para.62; *Prosecutor v. Furundžija*, Case No.: IT-95-17/1-T, Judgement, 10 December 1998, para. 288; *Prosecutor v. Serushago*, Case No. ICTR-98-39-S, Sentence, 5 February 1999, para.20; and *Prosecutor v. Kambanda*, Case No. ICTR-97-23-S, Judgement and Sentence, 4 September 1998, para.28.

⁷⁸ The 1942 Declaration of St. James's Palace stated that the amongst the principal war aims of the signatories was “the punishment through the channel of organized justice of those guilty and responsible for these crimes”. Available at http://www.coe.int/t/e/cultural_co-operation/education/BulletinSpecialAvril2009_EN.pdf.

⁷⁹ In the *Todorović* case, the ICTY stated that retribution must reflect a fair and balanced approach to punishment, and that the penalty imposed must be proportionate to the wrongdoing. *Prosecutor v. Todorović*, Case No. IT-95-9/1-S, Trial Chamber, Sentencing Judgment, 31 July 2001, at para. 29.

Retribution is therefore distinguished from revenge or vengeance (*lex talionis*),⁸⁰ and instead based on the principles of justice and punishing persons have violated fundamental values held by the international community.⁸¹ Deterrence has also been increasingly identified as a major function of ICL.⁸² Punishment is then justified as a means of preventing future atrocities by dissuading the perpetrator (specific deterrence)⁸³ or others (general deterrence)⁸⁴ from subsequently committing similar core international crimes. The purpose is not to inflict punishment as it is deserved, but because of its utilitarian effect of reducing recidivism and repeated threats to international peace and stability.⁸⁵

Although these two penal underpinnings associated with ICL processes may be easily transposed to a regional context, it is significant that its objective(s) are seldom clear or explicitly stated within the modern ICrimJ system. For example, the Statutes of the ICTY and ICTR do not provide any further indication about the rationale behind bringing to justice the perpetrators of international crimes.⁸⁶ The ICC Statute similarly does not explicate the purpose(s) of punishing offenders under ICL beyond the broad call of ICrimJ to end impunity for crimes that threaten the peace and

⁸⁰ This was clarified in the *Aleksovski* case, where the ICTY held that retribution is not the fulfilment of a desire for revenge but an expression of “the outrage of the international community”. *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Appeal Judgement, 24 March 2000, at para.185.

⁸¹ The ICTY stated in the *Nikolić* case that “retribution is the expression of condemnation and outrage of the international community ... within the context of international criminal justice, retribution is understood as a clear statement by the international community that crimes will be punished and impunity will not prevail”. *Prosecutor v. Nikolić*, Case No. IT-02-60/1-S, Trial Chamber, Sentencing Judgment, 2 December 2003, at paras.86-87. See also *Aleksovski*, *supra* n.80, at para.185; and *Kambanda*, *supra* n.77, at para.28.

⁸² In the *Erdemović* case, the ICTY recognised that the tribunal was a means “to deter the parties to the conflict in the former Yugoslavia from perpetrating further crimes or to discourage them from committing further atrocities”. *Erdemović*, *supra* n.77, at para.58.

⁸³ The ICTY noted in the *Kupreškić* case that an objective was “to deter the specific accused as well as others, which means not only the citizens of Bosnia and Herzegovina but persons worldwide from committing crimes in similar circumstances against international humanitarian law”. *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Trial Chamber, Judgment, 14 January 2000, at para.848.

⁸⁴ In the *Todorović* case, the ICTY held that punishment should have “sufficient deterrent value to ensure that those who would consider committing similar crimes will be dissuaded from doing so”. The ICTR also stated in the *Rutaganda* case that the penalties should “dissuade forever, others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate the serious violations of international humanitarian law and human rights”. See *Todorović*, *supra* n.79, at para. 30; and *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgement and Sentence, 6 December 1999, at para.456.

⁸⁵ The ICTY in the *Nikolić* case however recognised the critique of utilitarian deterrence theories and presented an argument of deterrence based on awareness of obligations and respect for the rule of law, rather than the fear of the consequences of breaking the law. It added that the accused individuals were not “simply an instrument to achieving the goal of the establishment of the rule of law”. *Nikolić*, *supra* n.81, at paras.89-90.

⁸⁶ Although the ICTY noted in the *Erdemović* case the various functions of “general prevention (or deterrence), reprobation, retribution (or ‘just deserts’), as well as collective reconciliation”, it did not define them or suggest a hierarchy of importance. *Erdemović*, *supra* n.77, at para.58.

security of the world, thereby contributing to their prevention. Van Zyl Smit highlights that the inability to elaborate and develop penal justifications in the ICC Statute then reflects the difficulties in achieving international consensus on ICrimJ.⁸⁷ As such, not only are there no strict penological guidelines for a regional criminal court to replicate,⁸⁸ but the current system does also not encapsulate a hierarchy regarding the intended goals of ICL to be adopted in the regionalisation of ICrimJ.⁸⁹ This is important because restorative justice may then be just as legitimate an approach as retributive justice, and both formal processes and informal mechanisms become equally acceptable forms for addressing international crimes.⁹⁰

At this juncture, it is crucial to recognise that besides inconsistency in prioritising retribution and deterrence,⁹¹ these two rationales for punishing perpetrators of international crimes are also plagued by problems. For example, the retributive intent of ICL is often undermined by selective prosecution and punishment.⁹² The problem is exacerbated by inconsistencies in the punishment meted out to offenders both within and between ICrimJ institutions at the international and national levels.⁹³ Approaching ICrimJ from a purely retributive angle further raises

⁸⁷ Dirk van Zyl Smit, "Punishment and Human Rights in International Criminal Justice", *Human Rights Law Review* 2 (2002):1-17, at 15.

⁸⁸ Besides an absence of penological justifications, Henham even argues that there is "substantive irrationality" in ICL. Ralph Henham, *Punishment and Process in International Criminal Trials* (Aldershot: Ashgate Publishing, 2005), at 14.

⁸⁹ The ICrimJ system lacks independent theoretical foundations, and had simply assumed the structure, modalities and rules of ordinary criminal procedure and punishment. Henham thus contends that the absence of penological justifications in the ICTY, ICTR and ICC Statutes thus weakens the claims of a "rational foundation for the exercise of democratic principles of criminal justice". *Ibid*, at 19.

⁹⁰ Akhavan contends that ICrimJ should go beyond the conventional rationales for punishment like retribution and deterrence, and can help in post-conflict reconciliation. Payam Akhavan, "The Rise, and Fall, and Rise, of International Criminal Justice", *Journal of International Criminal Justice* 11 (2013): 527-536, at 532.

⁹¹ There is even considerable inconsistency within ICrimJ institutions. For example, the ICTY has stated that retribution and deterrence were the primary and secondary objectives respectively (*Nikolić* case); that general deterrence and retribution as "equally important" (*Stakić* case); and that "deterrence probably is the most important factor" (*Mucić* case). See *Nikolić*, *supra* n.81, at para.59; *Prosecutor v. Stakić*, Case No. IT-97-24-T, Trial Chamber, Judgment, 31 July 2003, at para.900; *Prosecutor v. Mucić et al.*, Case No. IT-96-21-T, Judgment, 16 November 1998, at para.1234.

⁹² The sheer scale and number of perpetrators involved in mass atrocities will overwhelm any legal institution, and a strict judicial approach "will of necessity let off huge numbers" of guilty individuals. Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000), at 298.

⁹³ The inequality and unpredictability arise from broad judicial discretion and absence of a sentencing heuristic at the international level, as well as a wider range of domestic sanctions and imprisonment terms. Mark Drumbl, *Atrocity, Punishment and International Law* (Cambridge: Cambridge University Press, 2007), at 15.

other concerns,⁹⁴ including a fixation on punishment that not only fails to consider costs or other extraneous factors,⁹⁵ but can be redundant⁹⁶ or morally unjustified⁹⁷. The rationale of protecting society through incapacitation⁹⁸ may therefore also prove inappropriate,⁹⁹ as the ICTY noted in the *Kunarac* case:

“Unless it can be shown that a particular convicted person has the propensity to commit violations of international humanitarian law ... it may not be fair and reasonable to use protection of society, or ‘preventive detention’ in determining punishment.”¹⁰⁰

Deterrence is also problematic as little evidence exists to indicate that the threat of punishment deters individuals from perpetrating international crimes.¹⁰¹ Claims of its effectiveness are further weakened by the argument that mass atrocities are typically committed based on long-standing ideologies of hate and other complex motivations that are not easily captured by the cost-benefit analysis of rational calculation.¹⁰² Indeed, the creation of the ICTY did not stop the atrocities from continuing in the former Yugoslavia between 1993 and 1995. Moreover, even if deterrence does work in theory, the current weak and indeterminate enforcement of

⁹⁴ In the *Mucić* case, the ICTY noted that “[r]etributive punishment by itself does not bring justice”, and that retribution “as the only factor in sentencing is likely to be counterproductive and disruptive of the entire purpose of the Security Council, which is the restoration and maintenance of peace”. *Mucić*, *supra* n.87, at para.1231.

⁹⁵ Extraneous factors may sometimes supersede the appropriateness or right to seek retributive punishment. Joel Feinberg, *Doing and Deserving* (Princeton: Princeton University Press, 1970), at 60.

⁹⁶ See Mark Drumbl, “Collective Violence And Individual Punishment: The Criminality Of Mass Atrocity”, *Northwestern University Law Review* 99 (2005):539-610, at 610.

⁹⁷ See Ralph Henham, “Philosophical Foundations of International Sentencing”, *Journal of International Criminal Justice* 1 (2003):64-85, at 74-75.

⁹⁸ In the *Tadić* case, the ICTY suggested that “incapacitation of the dangerous” was also a desirable function of ICL. *Prosecutor v. Tadić*, Case No. IT-94-1-T, Trial Chamber, Sentencing Judgment, 14 July 1997, at para.61.

⁹⁹ The ICTY however subsequently held in the *Krnjelac* case that incapacitation of the dangerous and rehabilitation were “of little significance”. *Prosecutor v. Krnjelac*, Case No. IT-97-25-T, Trial Chamber, Judgement, 15 March 2002, at para.508.

¹⁰⁰ *Prosecutor v. Kunarac*, Case No. IT-96-23, Trial Chamber, Judgment, 22 February 2001, at para.843.

¹⁰¹ Goldstone notes that the deterrent effect will always be unpredictable, and even if political and military leaders anticipate facing possible conviction and punishment for core international crimes, not all will be deterred from committing them. Richard Goldstone, *South-East Asia and International Criminal Law* (Oslo: Torkel Opsahl Academic EPublisher, 2011), at 17.

¹⁰² While less ideological regimes may be deterred by the threat of criminal prosecutions, Bass notes that “those bent on mass slaughter have shrugged off such warnings”. Moreover, if atrocities are already underway when such threats are delivered, the accused are already criminally liable and “thus may think they have nothing to gain by stopping now”. Bass, *supra* n.92, at 287 and 291.

ICL in practice greatly reduces its efficacy.¹⁰³ It has long been posited that behaviour is affected by the perceived risk of ‘getting caught’ rather than the perceived severity of the punishment.¹⁰⁴ Although the chances of being held accountable for core international crimes have increased, it is still relatively small given that the ICrimJ system must rely on State cooperation to apprehend and bring the suspect(s) to trial.¹⁰⁵

That said, in discerning the form(s) that would serve the interests of ICL and the States that will enforce it, formal trials and penal sanctions cannot be discounted as potentially vital accountability mechanisms within a regional ICrimJ framework.¹⁰⁶ For the reasons cited above and also to avoid the fear of possible political manipulation, retribution should just not be the sole penological principle underpinning a regional ICrimJ mechanism. This is underscored by the insight that deterrence may actually be more effective in a regional context as neighbouring States not only have a larger vested interest to act and cooperate, but can also apply greater political and other pressures. It is also noteworthy that the UNSC unequivocally linked the notions of peace and justice with the creation of the ICTY and ICTR under Chapter VII of the UN Charter,¹⁰⁷ as well as through its powers to both refer a situation to the ICC and defer the Court’s activity in certain circumstances.¹⁰⁸ From the perspective of States, post-conflict reconciliation and determining the ‘truth’ are thus functions of ICL that can also provide strong pillars for a regional ICrim

¹⁰³ Some scholars note that “deterrence is unlikely to be possible if potential offenders take the view that they may be able to obtain exemption from prosecution”. Cryer, *supra* n.74, at 38.

¹⁰⁴ For example, see William Bailey and Ruth Lott, “Crime, Punishment and Personality: An Examination of the Deterrence Question”, *Journal of Criminal Law and Criminology* 67 (1976):99-109; and Julie Horney and Ineke Marshall, “Risk Perceptions Among Serious Offenders: The Role of Crime and Punishment”, *Criminology* 30 (1992):575-594.

¹⁰⁵ Bass argues that effective deterrence requires a credible and intimidating threat of prosecution that allows no one to avoid punishment. That said, Harhoff and Burke-White separately recognise that international criminal tribunals and the ICC are beginning to have some deterrent effect. See Bass, *supra* n.92, at 295; Frederick Harhoff, “Sense and Sensibility in Sentencing – Taking Stock of International Criminal Punishment”, in Ola Engdahl and Pål Wrangé, eds., *Law at War: The Law as it was and the Law as it should be* (Leiden: Martinus Nijhoff, 2008), at 128; and William Burke-White, “Complementarity in Practice: The International Criminal Court as part of a system of Multi-level Global Governance in the Democratic Republic of Congo”, *Leiden Journal of International Law* 18 (2005):557-590, at 587-588.

¹⁰⁶ Expressivism has emerged as another rationale for trials and punishment. It contends that these mechanisms not only affirm the rule of law and moral code, but also serve important narrative, pedagogical and educational functions. See Diane Marie Amann, “Message as a Medium in Sierra Leone”, *International Law Students Association Journal of International & Comparative Law* 7 (2001):237-245, at 243-244; and Diane Marie Amann, “Expressivism and Genocide”, *International Criminal Law Review* 2 (2002): 93-143.

¹⁰⁷ For a discussion, see M. Cherif Bassiouni, “Searching for Peace and Achieving Justice: The Need for Accountability”, *Law and Contemporary Problems* 59 (1996):9-28; and Linda Keller, “The False Dichotomy of Peace versus Justice and the International Criminal Court”, *Hague Justice Journal* 3 (2008):12-47.

¹⁰⁸ See Articles 13 and 16, ICC Statute.

mechanism.¹⁰⁹ Ascertaining the truth and producing an unbiased record of events not only acknowledge the suffering of victims, but also prevent the denial of crimes committed and falsification of history. Besides facilitating ‘social healing’ and a lasting peace, they further re-establish the rule of law and provide a sense of justice.¹¹⁰ This ideal of restoring and maintaining peace through criminal proceedings was elaborated by the ICTY Trial Chamber in the *Nikolić* case:

“(T)hrough public proceedings, the truth about the possible commission of war crimes, crimes against humanity and genocide was to be determined, thereby establishing an accurate, accessible historical record. The Security Council hoped such a historical record would prevent a cycle of revenge killings and future acts of aggression”.¹¹¹

Strict criminal prosecutions and punishment nevertheless do not always effectively achieve the twin goals of protecting and maintaining global peace and security, as well as sanctioning and deterring atrocity.¹¹² There are also possible disconnects between correctional modalities and their proclaimed functions, as well as little hard evidence of a link between criminal prosecutions and societal reconciliation.¹¹³ Moreover, formal trials are not unequivocally accepted as an appropriate forum to reconcile different perceptions of truth and write history.¹¹⁴

Less formal approaches to accountability and non-penal methods may sometimes then be more effective in furthering ICrimJ and State interests. In this

¹⁰⁹ In the *Erdemović* case, the ICTY acknowledged a duty to contribute to “the wider issues of accountability, reconciliation and establishing the truth”. *Prosecutor v. Erdemović*, Case No. IT-96-22-Tbis, Trial Chamber, Sentencing Judgment, 5 March 1998, at para.21.

¹¹⁰ The ICTY stated in the *Plavšić* case that acknowledgement of serious crimes and acceptance of responsibility for the committed wrongs are very important for promoting reconciliation. *Prosecutor v. Plavšić*, Case No. IT-00-39&40/1-S, Trial Chamber, Sentencing Judgment, 27 February 2003, at paras.80-81.

¹¹¹ *Nikolić*, *supra* n.81, at para.60.

¹¹² They may even have negative consequences like: (1) exacerbating irreconcilable social divisions; (2) prosecutions being used to settle ‘old scores’, thereby creating new injustices; and (3) fragile new governments losing legitimacy due to an inability to pursue prosecutions effectively. See Bruce Broomhall, *International Justice and the International Criminal Court –Between Sovereignty and the Rule of Law* (Oxford: Oxford University Press, 2003), at 55.

¹¹³ Stover and Weinstein note that there is no direct link between criminal trials and reconciliation. Instead, they find that prosecutions often caused suspicion and fear, and further divided the small multi-ethnic communities. See Eric Stover and Harvey Weinstein, “Conclusion: A Common Objective, A Universe of Alternatives”, in Eric Stover and Harvey Weinstein, eds., *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge: Cambridge University Press, 2004).

¹¹⁴ Criminal trials are not designed to ensure a full discussion of history, let alone resolve political debates regarding the validity of different accounts. See Cryer, *supra* n.74, at 32-33.

connection, it is germane that other functions of ILC like denunciation, re-education and rehabilitation exist, and may be applicable for efforts to regionalise ICrimJ. Denunciation is the public declaration of the abhorrence of the conduct and stigmatisation of the perpetrator,¹¹⁵ while re-education allows offenders to recognise their individual responsibility and guilt, as well as to denounce their criminal conduct.¹¹⁶ Rehabilitation is generally subsidiary to retribution, deterrence, and denunciation,¹¹⁷ but has occasionally been considered for low-level offenders.¹¹⁸ These ‘softer punishments’ highlight that both retributive justice and restorative justice can be equally valid goals of ICrimJ,¹¹⁹ and indicate that informal mechanisms may also deal with international crimes effectively. The next section therefore considers whether less formal institutions of punishment or extra-legal mechanisms of accountability could serve as regional ICrimJ initiatives.

4.1.2 Alternative Approaches to Achieve Justice and Accountability

The predominant focus in ICrimJ has been retributive justice and criminal trials, and not restorative justice and alternative mechanisms of atonement.¹²⁰ This perhaps reflects the political allure of the predictability and closure that exist in the prosecutorial process. Certainty of outcome exists in that a judicial decision of guilt or

¹¹⁵ In the *Kordić & Čerkez* case, the ICTY noted that reprobation or stigmatisation was “closely related to the purpose of affirmative prevention”, and served “to influence the public not to violate this legal system”. *Kordić & Čerkez*, Case No. IT-95-14/2-A, Appeals Chamber, Judgment, 17 December 2004 at para.1080-81.

¹¹⁶ Zolo however notes that the retributive character of ICrimJ “rules out the goal of re-education”. Danilo Zolo, “Peace through Criminal Law?”, *Journal of International Justice* 2 (2004):727-734, at 733.

¹¹⁷ The ICTY noted in the *Mucić* case that “although rehabilitation (in accordance with international human rights standards) should be considered as a relevant factor”, it cannot play a *predominant* role primarily because of the serious nature of the crimes being prosecuted. *Prosecutor v. Mucić et al.*, Case No.: IT-96-21-A, Appeals Chamber, Judgment, 20 February 2001, at para.806.

¹¹⁸ In the *Erdemović* case, the ICTY noted that the accused was “not a dangerous person for his environment”, and that his circumstances and character indicated that he was “reformable and should be given a second chance to start his life afresh upon release, whilst still young enough to do so”. In the *Rutaganira* case, the ICTR also identified rehabilitation and reintegration of the accused back into society as a main purpose of punishment, and considered the guilty plea and remorse expressed by the accused as factors in favour of chances for his rehabilitation. *Erdemović*, *supra* n.109, at para.16; *Prosecutor v. Rutaganira*, Case No. ICTR-95-1C-T, Trial Chamber, Judgment and Sentence, 14 March 2005, paras.107-118.

¹¹⁹ Howse and Llewellyn however note the possibility that fear of punishment in the retributive system and (mis)perception that restorative justice is a ‘soft option’ may prompt preference of one system over the other. Jennifer Llewellyn, and Robert Howse, *Restorative Justice – A Conceptual Framework*, Paper for the Law Commission of Canada (1999), at 88.

¹²⁰ However, restorative justice was previously the dominant model for a long time, and was practiced across various different societies and cultures. See Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice*, (Pennsylvania: Herald Press, 1990); John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford: Oxford University Press, 2002); and Daniel Van Ness and Karen Strong, *Restoring Justice: An Introduction to Restorative Justice* (Ohio: Anderson Publishing, 2006).

innocence (or in some cases a politically predetermined verdict) brings an end to the case, having presumably served the interests of justice and alleviated the suffering of victims.¹²¹ However, as noted earlier, individual trials do not provide a sufficient platform to determine the ‘truth’ behind systemic violence, much less foster peace and reconciliation among enemies in a divided society.¹²² Moreover, the trial process and procedure is not victim centred.¹²³ This is however slowly changing as victims may now participate in ICC proceedings to share their “views and concerns” and seek reparations,¹²⁴ particularly in the prosecution and punishment of the leaders and masterminds behind core international crimes.¹²⁵ With the conviction of Thomas Lubanga Dyilo for war crimes under Article 8(2)(e)(vii),¹²⁶ the Court handed down its first sentencing decision¹²⁷ and decision on reparations for victims.¹²⁸

In considering the regionalisation of ICrimJ, it is nevertheless appreciated that there is still a need to tackle transitional justice issues, including sustaining peace in

¹²¹ Prosecutions have been suggested to provide victims and their families with a sense of justice and closure, and the ICTY noted in the *Nikolic* case that “punishment must therefore reflect both the calls for justice from the persons who have – directly or indirectly – been victims of the crimes”. *Nikolic*, *supra* n.81, at para.82.

¹²² The pursuit of criminal liability may then even divert much needed attention away from addressing the root causes of mass atrocities and developing broader-based reconstruction efforts.

¹²³ Zehr notes that criminal trials are primarily focused on establishing guilt/innocence and offender-oriented, while Dignan and Cavadino highlight that victims are mainly used as witnesses and subsequently ignored. Zehr, *supra* n.120, at 233; Jim Dignan and Michael Cavadino, “Which Model of Criminal Justice Offers the Best Scope for Assisting Victims of Crimes?”, in Ezzat Fattah and Tony Peters, eds., *Support for Crime Victims in a Comparative Perspective*, (Leuven: Leuven University Press, 1998).

¹²⁴ Zappala notes that victim rights are increased and expanded “to the procedural dimension” by provisions in the ICC Statute, which Cassese opines are highly innovative and “a great advance in international criminal procedure”. See Articles 15(3), 19, 68(3), 75(1) and 75(3), ICC Statute; Salvatore Zappala, *Human Rights in International Criminal Proceedings* (Oxford: Oxford University Press, 2003), at 221; and Antonio Cassese, “The Statute of the International Criminal Court: Some Preliminary Reflections”, *European Journal of International Law* 10 (1999):144-171, at 167.

¹²⁵ In March 2012, Thomas Lubanga Dyilo was found guilty for his leadership role in the enlistment, conscription and use of children under the age of 15 to participate actively in hostilities. Although the hierarchy and functioning structure within the army enabled an appropriate degree of delegation, the ICC noted that this “does not diminish the extent to which the accused was aware of what was happening within the armed forces or his overall responsibility for, or involvement in, their activities. Instead, it is an inevitable result of his position as the overall commander.” See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06, Trial Chamber I, Judgement pursuant to Article 74 of the Statute, 14 March 2012, at para.1219.

¹²⁶ *Ibid.*

¹²⁷ Lubanga was sentenced by the ICC Trial Chamber to 14 years’ imprisonment, and the defence subsequently appealed against both the conviction and defence. The appeals hearing ending in May 2014, and a date for the ruling has yet to be announced. See Decision on Sentence pursuant to Article 76 of the Statute, *Dyilo*, ICC-01/04-01/06-2901, Trial Chamber I, 10 July 2012.

¹²⁸ Decision establishing the principles and procedures to be applied to reparations, *Dyilo*, ICC-01/04-01/06-2904, Trial Chamber I, 7 August 2012.

the post-conflict phase,¹²⁹ national reconstruction and societal reintegration.¹³⁰ As retributive justice and criminal trials address only one aspect of mass atrocities,¹³¹ a comprehensive response that restores peace and stability may entail a paradigm shift away from simply submitting the offender to a ‘just’ response.¹³² Depending on the context and nature of the crime(s), restorative justice and non-penal forms of regional accountability could be more appropriate.¹³³ Indeed, such mechanisms are said to more effectively fulfil the functions of trials in strained and divergent societies, whilst creating fewer problems.¹³⁴ Less formal institutions of punishment and extra-legal mechanisms of accountability may thus prove suitable as regional ICrimJ initiatives.

Hence, amnesties and truth commissions should be examined to determine whether they can be appropriate and responsive regional mechanisms to further ICrimJ. Amnesties are often negotiated (or offered) as part of a peace agreement or

¹²⁹ *Jus post bellum* considerations have become increasingly important given the enmeshment of the concepts of intervention, armed conflict and peace-making. For some discussions on *jus post bellum*, see Carsten Stahn and Jann Kleffner, *Jus Post Bellum: Toward a Law of Transition From Conflict to Peace* (Cambridge: Cambridge University Press, 2008); Eric De Brabandere, “Responsibility for Post-Conflict Reforms: A Critical Assessment of Jus Post Bellum as a Legal Concept”, *Vanderbilt Journal of Transnational Law* 43 (2010):119-149; and Liliana Jubilut, “Towards a New Jus Post Bellum: The United Nations Peacebuilding Commission and the Improvement of Post-Conflict Efforts and Accountability”, *Minnesota Journal of International Law* 20 (2011):26-64.

¹³⁰ Howland and Calathes contend that international criminal institutions like the ICTR therefore “cannot adopt traditional and Western criminal justice punishment objectives such as deterrence, retribution, or incapacitation when these objectives so clearly cannot be achieved in the context of mass human rights violations”. Todd Howland and William Calathes, “The UN’s International Criminal Tribunal, Is It Justice or Jingoism for Rwanda? A Call for Transformation”, *Virginia Journal of International Law* 39 (1998):135-167, at 154. See also Stephan Parmentier, “Global Justice in the Aftermath of Mass Violence: The Role of the International Criminal Court in Dealing with Political Crimes”, *International Annals of Criminology* 41(2003):203-224.

¹³¹ Stover notes that full justice for victims and their families was more than “criminal trials and the ex cathedra pronouncements” of judges, and included: (1) the return of stolen property; locating and identifying the bodies of the missing; (3) capturing and trying all offenders; (4) securing reparations and apologies; and (5) resuming normal lives devoid of fear. Eric Stover, “Witnesses and the Promise of Justice in the Hague”, in Eric Stover and Harvey Weinstein, eds., *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge: Cambridge University Press, 2004), at 115.

¹³² In terms of function, Braithwaite argues that restorative justice not only better reconciles victims, offenders, and communities, but will also deter, incapacitate, and rehabilitate more effectively than a punitive system. Braithwaite, *supra* n.120.

¹³³ By focusing on the prosecution of individuals rather than the restoration and reintegration of the victim communities, Maogoto highlights that there is a crucial failure to address any prevailing culture of violence or its contextual determinants. Jackson Maogoto, “International Justice for Rwanda Missing the Point: Questioning the Relevance of Classical Criminal Law Theory”, *Bond Law Review* 13 (2001):190-223.

¹³⁴ Drumbl posits that genocide trials in Rwanda may, for example, worsen ethnic identity politics and threaten long-term stability. Mark Drumbl, “Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda”, *New York University Law Review* 75 (2000):1221-1326.

the transition between regimes.¹³⁵ They prevent prosecution under law and absolve otherwise criminal acts in order to end hostilities, restore peace or facilitate the transfer of power. Amnesties have even been supported by the international community,¹³⁶ and may be even better received by neighbouring countries in the affected region if they help stop the conflict and its negative cross-border effects, including the flow of combatant and refugees. While sometimes a pragmatic means to avoid further atrocities and critical to post-conflict reconciliation and reintegration processes,¹³⁷ amnesties could however conflict with international law.¹³⁸ However, regardless of whether a State has breached international treaty or customary law by granting them,¹³⁹ national amnesties do not deprive other States or an international court of the universal jurisdiction to prosecute individuals accused of core

¹³⁵ Amnesties can be ratified in international treaties, or enshrined in national constitutions or domestic legislation. Recent examples include those given to perpetrators of the post-election violence in Kenya, and under Uganda's Amnesty Act (2000) after two-decades of fighting between government and Lord's Resistance Army (LRA) forces.

¹³⁶ Scharf notes that the UN had "pushed for, helped negotiate, and/or endorsed the granting of amnesty as a means of restoring peace and democratic government" in Cambodia, El Salvador, Haiti, and South Africa. Michael Scharf, "The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes", *Law and Contemporary Problems* 59 (1996):41-61, at 41.

¹³⁷ For example, the end of hostilities between the Sierra Leone government and Revolutionary United Front rebels would not have been possible without the blanket amnesty provision in the Lomé Peace Agreement. See Sierra Leone Truth and Reconciliation Commission, *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, Vol. 1 (Freetown: TRC, 2004), at 29-30.

¹³⁸ Different types of amnesties exist: (1) amnesties provided for under Additional Protocol II to the 1949 Geneva Conventions, which should not be legally problematic; (2) individualised amnesties that follow genuine investigations and are conditional on certain conduct (like confessions), which are less likely to be unlawful; and (3) 'blanket' amnesties that bar legal proceedings without any distinction or attached conditions. While blanket amnesties are mostly criticised and not accepted by the international community, individualised amnesties are less likely to be unlawful – especially if they are conditional; provided by a mechanism (like a TRC) that had conducted genuine investigations; and/or put in place procedures for victim compensation. See Francesca Lessa and Leigh Payne, eds., *Amnesty in the Age of Human Rights Accountability* (Cambridge: Cambridge University Press, 2012); Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge: Cambridge University Press, 2009); Lousie Mallinder, *Amnesty, Human Rights and Political Transitions* (Oxford: Hart Publishing, 2008); Douglass Cassel, "Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities", *Law and Contemporary Problems* 59 (1996):197-230, at 218; John Dugard, "Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?", *Leiden Journal of International Law* 12 (1999):1001-1015; Anja Seibert-Fohr, "The Relevance of the Rome Statue of the International Criminal Court for Amnesties and Truth Commissions", *Max Planck Yearbook of United Nations Law* 7 (2003):553-590; Michael Scharf, "The Amnesty Exception to the Jurisdiction of the International Criminal Court", *Cornell International Law Journal* 32 (1999):507-527; and William Burke-White, "Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation", *Harvard International Law Journal* 42 (2001):467-533, at 482.

¹³⁹ In the *Kallon and Kamara* case, the SCSL held that while an international norm that a State cannot grant amnesty for core international crimes is developing, it has yet to crystallize. *Prosecutor v. Kallon and Kamara*, Case Nos. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Appeals Chamber, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, at para.82.

international crimes.¹⁴⁰ Indeed, cases barred from domestic prosecutions by amnesties do not fall within the list of inadmissible situations covered by the ICC Statute,¹⁴¹ and clearly can be brought before the Court (or States Parties) if jurisdictional requirements are met.¹⁴² Unconditional amnesties that had been traded for peace or a regime change in a political settlement are thus prevented from advancing impunity. Individualised and conditioned amnesties tied to the process of genuine national investigatory or ‘truth’ commissions are however not viewed in the same unfavourable light.¹⁴³ These processes could then possibly be supervised by regional commissions of inquiry for even greater legitimacy and credibility.¹⁴⁴

In this regard, truth and reconciliation commissions (TRCs)¹⁴⁵ are another potential solution that can be replicated at a regional level to ensure “justice is not entirely sacrificed to the cause of peace”.¹⁴⁶ They proffer an attractive modality for a regional mechanism that may achieve both peace and justice more effectively than

¹⁴⁰ For example, while amnesty granted in the Lomé Agreement precludes domestic prosecutions in Sierra Leone, the SCSL held that “a State cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty” and domestic amnesties are “ineffective in depriving an international court such as the Special Court of jurisdiction”. The UN Secretary-General has also stated that UN-endorsed peace agreements “can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights”, and that amnesties cannot excuse such international crimes even though they can help in post-conflict societal reintegration. See *Kallon and Kamara*, *supra* n.139, at paras.67 and 82; and *Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Situations*, UN doc. S/2004/616 (2004) at paras. 10 and 32.

¹⁴¹ Amnesties are not referred to, prohibited or discouraged by the ICC Rome Statute or its Rules of Procedure and Evidence. An amnesty is a pre-conviction measure that is fundamentally different from post-conviction pardons, parole, and commutation of sentence. The structure of admissibility provisions in the ICC Statute in Articles 17(1)(a)-(c) thus allow the Court to assume jurisdiction where amnesty bars prosecution at the national level. Broomhall, *supra* n.112, at 100-102; Freeman, *supra* n.138, at 75.

¹⁴² States may also decide to grant national amnesties to individuals even after ICC indictments. For example, Ugandan President Yoweri Museveni had in 2006 declared that his government would grant total amnesty to Lord’s Resistance Army (LRA) leader Joseph Kony, despite an ICC indictment.

¹⁴³ The ICC can decide that such processes offered a sufficiently independent and rigorous investigation, as required by Article 17(1)(b) of the ICC Statute, before granting a principled and individualised amnesty. Subsequent action will then be unlikely if the amnesties lead to a reasonable reconciliation process and further investigations do not serve the overall interests of justice. Indeed, under Article 53(2)(c) of the ICC Statute, the ICC Prosecutor may then conclude that there is not a sufficient basis for a prosecution because it “is not in the interests of justice, taking into account all the circumstances”.

¹⁴⁴ See discussion on how this may be implemented within Southeast Asia in the concluding chapter.

¹⁴⁵ TRCs have an element of reconciliation that may not be explicit in other investigatory or truth commissions, but it is adopted for simplicity as they otherwise share similar characteristics: (1) focused on past events; (2) investigate a pattern of abuse over a set period of time instead of a specific event; (3) a temporary body; (4) officially sanctioned or empowered by the concerned State; and (5) work directly and broadly with the affected population to gather information on their experiences. See Priscilla Hayner, “Fifteen Truth Commissions – 1974 to 1994: A Comparative Study”, *Human Rights Quarterly* 16 (1994)597-655, at 604; and Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* 2nd ed. (New York: Routledge, 2011), at 11-12.

¹⁴⁶ Dugard, *supra* n.138, at 1015.

trials,¹⁴⁷ especially in communities where societal cohesion is important.¹⁴⁸ A regional TRC could not only record and reflect history more comprehensively given its remit to contextualise the atrocities,¹⁴⁹ but also strengthen the rule of law by educating regional societies about the wrongfulness of the acts and deterring future misconduct.¹⁵⁰ While being less offender-oriented and more focused on helping victims and their families,¹⁵¹ they can also contribute significantly to accountability and justice by either working in tandem with prosecutions or standing in their place when criminal trials are not feasible.¹⁵² That said, they must not be deemed a panacea given their inability to directly punish malefactors,¹⁵³ and certainly not a general substitute for criminal prosecutions of international crimes.¹⁵⁴ A regional TRC can be

¹⁴⁷ Landsman believes that TRCs provide most of the benefits ascribed to the prosecutorial approach, including identifying past crimes, facilitating social criticism of such acts and reinforcing respect for the rule of law. Similarly Allen argues that they are “a complex and principled compromise between justice and unity in which elements of both values are retained”. Stephan Landsman, “Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions”, *Law and Contemporary Problems* 59 (1996):81-92, at 88; and Jonathan Allen, “Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission”, *University of Toronto Law Review* 49 (1999):315-353 at 352.

¹⁴⁸ An investigatory commission is suited for achieving most of the goals attributed to adjudicative models in countries where resources are limited, a strong and impartial legal system is absent, or a judicial approach may otherwise be infeasible. Steven Ratner and Jason Abrams, *Accountability For Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 2nd ed. (Oxford: Oxford University Press, 2001), at 239.

¹⁴⁹ The objectives of TRCs are not just about uncovering factual evidence but also confronting and coming to terms with the past. See Stanley Cohen, “State Crimes of Previous Regimes: Knowledge, Accountability, and the Policing of the Past”, *Law and Social Inquiry* 20 (1995):7-50, at 12-22.

¹⁵⁰ Various problems that arise when criminal trials, instead of mechanisms like TRCs, are used to influence the collective memory of a country regarding past State-sponsored atrocities, including: (1) sacrifice of defendants rights; (2) distortion of history; (3) faulty assessments of the past; and (4) failure to achieve admissions of guilt or repentance. See Mark Osiel, “Ever Again: Legal Remembrance of Administrative Massacre”, *University of Pennsylvania Law Review* 144 (1995):463-704.

¹⁵¹ Such efforts could include, identifying victims, officially acknowledging their suffering, providing them with opportunities to confront the past and move on, and establishing a basis for reparations.

¹⁵² TRCs can be an effective complement or precursor to criminal trials. They may compel perpetrators to incriminate themselves; morally condemn the perpetrators of abuses; and prepare the ground for prosecutions or other sanctions. Hayner notes that most TRCs do not interfere with or duplicate any tasks of a functioning judiciary, and “have had every intention of strengthening prosecutions”. Hayner (2011), *supra* n.145, at 13.

¹⁵³ Berat and Shain note that “truth-telling without the option of retribution” can open old wounds. Lynn Berat and Yossi Shain, “Retribution or Truth-telling in South Africa? Legacies of the Transitional Phase”, *Law and Social Inquiry* 20 (1995):163-189, at 188.

¹⁵⁴ Bassioni argues that there can be no impunity for *jus cogens* crimes and prosecution is essential, while Landsman contends that criminal prosecution is usually “the wisest course for a successor regime”. However, as long as the selection is representative and not discriminatory, Broomhall notes that it may be hard to object if States with finite resources decide to prosecute selectively. Bassiouni, *supra* n.107, at 20; Landsman, *supra* n.147, at 92; and Broomhall, *supra* n.112, at 98.

considered if the social and political environments permit,¹⁵⁵ and it can be tailored to suit that unique context.¹⁵⁶ In essence, it must not end up being abused by States to implicitly promote impunity by becoming a political façade and simply excusing past abuses. A regional TRC must be able to conduct genuine and effective investigations, acknowledge the harm done, provide a platform for survivors to bear witness, and offer an avenue for redress and reconciliation.

In sum, conditional amnesties and TRCs have been seen as effective conduits for an increasingly ‘truth-focused’ and reconciliatory paradigm, and may be useful tools for a regional ICrimJ mechanism. Although they are more responsive to the spill-over effects and contextual complexities of international crimes, non-penal measures are nonetheless not always appropriate. Such alternative forms of accountability do not offer a good determination of an offender’s culpability or an accurate reflection of the seriousness of the crime, and are no substitute for criminal trials. While they are of significant practical value as alternatives to prosecution for lower-level offenders,¹⁵⁷ these processes clearly must work in tandem with criminal trials – where perpetrators not granted conditional amnesties are then prosecuted.¹⁵⁸ Moreover, criminal accountability and punishment remain the best way to handle higher-level perpetrators of core crimes. This is particularly true when it is recalled that the global community of States not only seeks to punish and deter such offenders, but often also to symbolically (and politically) paint their actions as nothing less than sheer evil.

¹⁵⁵ For a discussion on the causes and political factors that influence a State to choose a TRC in general, and specifically in Africa and Latin America (respectively), see Steven Roper and Lilian Barria, “Why Do States Commission the Truth? Political Considerations in the Establishment of African Truth and Reconciliation Commissions”, *Human Rights Review* 10 (2009):373–391; and Margaret Popkin and Naomi Roht-Arriaza, “Truth as Justice: Investigatory Commissions in Latin America”, *Law & Society* 20 (1995):79–116.

¹⁵⁶ Badly designed and poorly administered TRCs risk aggravating the situation in the concerned States. The practical challenges include building up its credibility and persuading perpetrators to incriminate themselves. To address the latter problem in South Africa, Berat and Shain note that amnesty was offered to those who committed politically motivated crimes on the condition that they appeared in the TRC’s open proceedings and publicly disclosed their actions. Berat, *supra* n.153, at 186.

¹⁵⁷ Pointing to the post-WWII experience, Bass notes that prosecutions of higher-level criminals are less likely to spark a backlash than that of lower-level war criminals. Bass, *supra* n.92, at 301.

¹⁵⁸ Ratner argues that judicialisation is acceptable if it does not divert limited resources from equally important approaches like diplomacy, negotiation, and sanctions. Steven Ratner, “The International Criminal Court and the Limits of Global Judicialization”, *Texas International Law Journal* 38 (2003):445-453, at 445.

4.2 The Appropriate Form(s) For An ASEAN Regional Mechanism

Bearing in mind that interpersonal relationships between ASEAN leaders affect the political and practical realities in the region, the main functions and focus of ICrimJ amongst the interdependent countries of Southeast Asia are better framed as deterrence and reconciliation, rather than punishment. In this vein, it is recalled that the clear-cut closure that exists in the prosecutorial process does not translate into reconciliation among enemies in a divided society, let alone bring about national reconstruction and societal reintegration. It is also noted **that non-penal options and** alternative processes are not only legitimate and valid, but have been mainstreamed in the ICrimJ system. Amnesties and truth commissions could therefore be more appropriate amongst AMS and face less opposition when the conflict has cross-border elements and/or effects. Indeed, **after winning independence, even the East Timorese government acknowledged the benefits of post-conflict reconciliation with Indonesia over legal proceedings under a criminal tribunal.**¹⁵⁹ Restorative justice and non-penal forms of regional accountability may then be more acceptable in the informal and face-conscious ASEAN context.

That said, this does not in any way imply that criminal prosecution and sanctions are inappropriate modalities for Southeast Asia. Even though restorative justice is a viable alternative to prosecution for masses of lower-level offenders, criminal accountability and punishment may be the better approach for higher-level perpetrators of international/regional crimes. In such cases, it is difficult to ignore the appeal of the predictability and certainty of outcome that exists in a judicial decision. Besides the rationale for criminal prosecutions and penal sanctions, formal trials must also remain an integral part of the regional ICrimJ process if ASEAN countries envision a credible regional alternative to the ICC, especially one that can justifiably claim jurisdiction over an international crime.¹⁶⁰ An impetus, albeit not overwhelming, therefore exists for AMS to create a regional criminal court. Four

¹⁵⁹ To investigate and document the human rights violations and make recommendations for legal proceedings, East Timor established the Commission for Reception, Truth and Reconciliation (CAVR) in 2002. Released in January 2005, its report detailed the human rights abuses that occurred and dismissed the claim that “rogue elements” of the Indonesian military were responsible. That same year, however, the governments of East Timor and Indonesia subsequently set up the Indonesia-East Timor Truth and Friendship Commission (CTF) to establish the conclusive truth and promote reconciliation and friendship, which recommended amnesties for perpetrators of serious crimes.

¹⁶⁰ See deliberation in Chapter 3, including brief discussion on the *ne bis in idem* regime of the ICC.

possible pathways have been identified by Burke-White: (1) creation of regional international criminal courts; (2) ICC sitting regionally; (3) jurisdictional preference to be granted to States within the region in which the crime occurred; and (4) creation of specialised domestic courts with regional judges.¹⁶¹ Some of these pathways are briefly touched upon later in relation to their practical viability in Southeast Asia. However, irrespective of which model is used, proper procedures will be required to ensure that defendant rights to a fair trial are safeguarded and participating survivors have a meaningful experience without undue administrative problems.¹⁶² This may provide the ICC with an opportunity to engage ASEAN and influence the development of regional ICrimJ norms and procedures.¹⁶³

As previously highlighted, Kenya had suggested, *inter alia*, an amendment to the Preamble of the ICC Statute with regards to its complementarity,¹⁶⁴ in line with the work of the AU to create a regional criminal court to prosecute alleged crimes committed on the continent.¹⁶⁵ A decision on amendments to the ICC Statute could not be taken at the ICC ASP meeting in November 2013 due to the requirement under Article 121(2) of the Statute, which states that three months notice is required.¹⁶⁶ It is however noteworthy that the ASP allowed amendments to the rules of procedure: dealing with pre-recorded testimony (Rule 68); allowing a change in the place of proceedings (Rule 100); permitting suspects to be away from trial and represented by lawyers (Rule 134).¹⁶⁷ The amendment to Rule 100 is significant for this discussion because the Court is now clearly allowed to sit in another State “to hear the case in whole or in part”.¹⁶⁸ Given that the ASP adopted by consensus the rules amendments, it may also accept some changes proposed by Kenya to the ICC Statute and

¹⁶¹ See William Burke-White, “Regionalization of International Criminal Law Enforcement: A Preliminary Exploration”, *Texas International Law Journal* 38 (2003):729-761, at 748-755.

¹⁶² See ICC Assembly of States Parties, *Report of the Court on the Revised Strategy in relation to Victims: Past, Present, and Future*, ICC-ASP/11/40, 5 November 2012.

¹⁶³ This is in line with the importance stressed on effective and comprehensive cooperation and assistance by non-Party States and regional organisations to enable the ICC to fulfil its mandate. See ASP resolution, ICC-ASP/12/Res.3, 27 November 2013.

¹⁶⁴ As Chapter 3 notes, there are no arguments or indications within the ICC Statute that regional courts need be carved out from the complementarity regime.

¹⁶⁵ Kenya suggested amendments regarding: irrelevance of official capacity (Article 27); trial in the presence of the accused (Article 63); offenses against the administration of justice (Article 70); establishing an Independent Oversight Mechanism (Article 112(4)); and the preamble setting out the complementary nature of the ICC Statute.

¹⁶⁶ See Article 121(2), ICC Statute.

¹⁶⁷ See ASP resolution, ICC-ASP/12/Res.7, 27 November 2013.

¹⁶⁸ *Ibid.*

Preamble.¹⁶⁹ In the meantime, the AU will continue the process of expanding the AfCHPR mandate to try international crimes,¹⁷⁰ potentially disregarding the ICC and ignoring possible overlaps between the two judicial bodies.¹⁷¹ It is therefore vital for the ICC to accommodate and engage such initiatives to avoid being shut out from the regional process.

Taking a leaf from the evolutionary stages (none, promotional, implementation, enforcement, strong enforcement) of human rights regimes espoused by Donnelly,¹⁷² it is however clear that ASEAN is not even at the declaratory or promotional phase for ICrimJ.¹⁷³ Regardless of any defensible legal arguments, ASEAN is thus unlikely, in the near future, to create a judicial organ with strong enforcement regimes capable of issuing authoritative and binding judgments against member States or their nationals who commit serious crimes, like egregious violation of human rights.¹⁷⁴ Although it represents the ultimate form of formal criminal justice, the necessary preconditions and adversarial culture do not yet exist for the creation of a regional criminal court in Southeast Asia.¹⁷⁵ Given that only two out of the ten ASEAN countries have signed and ratified the Rome Statute, it is also improbable that the ICC can sit regionally in Southeast Asia soon, or that there can even be a hybrid criminal court comprising of both regional judges and ICC judges.¹⁷⁶

¹⁶⁹ Under Article 121(4) of the ICC Statute, however, the amendment(s) will only enter into force one year after instruments of ratification or acceptance have been deposited with the UN Secretary-General by seven-eighths of the States Parties.

¹⁷⁰ See “Decision on Africa’s Relationship with the International Criminal Court (ICC)”, Doc. Ext/Assembly/AU/Dec.1(Oct.2013), Extraordinary Session of the Assembly of the African Union, 12 October 2013, Ethiopia.

¹⁷¹ Max du Plessis, “Implications of the AU decision to give the African Court jurisdiction over international crimes”, *Institute for Security Studies Paper* 235, June 2012, at 3.

¹⁷² Jack Donnelly, *Universal Human Rights in Theory & Practice*, 2nd ed. (Ithaca: Cornell University Press, 2003), at 151-152.

¹⁷³ The ‘leave well enough alone’ mentality taken towards sensitive issues, including international crimes, has meant that they are often dealt with “through the language of diplomatic nicety”. Feeland, *supra* n.52, at 1038.

¹⁷⁴ The ASEAN Charter and the AICHR Terms of Reference (TOR) both do not contain provisions that permit any form of intervention, even if egregious violations of human rights are being committed. Instead, they reiterate respect for ASEAN principles like sovereignty and non-interference in the internal affairs of AMS.

¹⁷⁵ During the 1998 UN Diplomatic Conference of Plenipotentiaries, Singapore stated that “[r]ealism dictated that the aim should not be to establish a court of human rights of the kind that existed in Europe or the Americas, for other regions were still a long way from establishing such institutions”. See Statement by Lionel Yee, *supra* n.65, at 81.

¹⁷⁶ The likelihood of such a formulation is further reduced due to the problems of ensuring that the regional and international components of both the prosecution and bench are able to overcome differences in language, experience and legal philosophy. Cassese notes that when international members are the majority, local judges may perceive them as “intrusive and overwhelming” and then seek to obstruct/hamper the process. Antonio Cassese, *International Criminal Law*, 3rd ed. (Oxford: Oxford University Press, 2012), at 267.

As such, even if the countries of Southeast Asia saw a pressing need to create an additional layer between the ICC and themselves, it is probably premature to envision the creation of a permanent regional court, or specialised domestic courts with a ready bench of regional judges. For political and resourcing reasons, ASEAN is unlikely to undertake any immediate or great degree of institutional change and development.¹⁷⁷ Maintaining a permanent legal infrastructure will not only be extremely onerous for the developing countries in the region, but also difficult in terms of applying consistent procedures and standards for arrests, detentions and investigations across all ten AMS. Hence, it would be pointless to immediately insist on a permanent regional judicial organ if ASEAN presently does not have the bandwidth or necessary funding to do the work. The most likely collective response involving a formal judicial institution will probably be on an *ad hoc* basis.¹⁷⁸

As countries will still have to carry out the sentences of a regionally constituted court, there will also be a difficult process of ensuring that all domestic laws, criminal codes and sentencing regimes are sufficiently modified to incorporate all the international (and regional) crimes that the AMS can find consensus on. Given this fact and the way that ASEAN operates, jurisdictional preference will then most probably be granted to States in which the crimes occurred. It should be noted that in East Timor, while the Special Panels for Serious Crimes (SPSC) of the Dili District Court¹⁷⁹ had convicted various individuals,¹⁸⁰ there was immense practical and logistical problems due to the complete lack of cooperation by Indonesia.¹⁸¹ Furthermore, no individual AMS was willing to get involved. The reality is that, to maintain regional peace and security, trade-offs may be needed when attempting to prevent impunity for international (and regional) crimes. The question will therefore be how an ASEAN mechanism on ICrimJ can operate in reality, while complementing rather than duplicating, or worse working counter to, efforts at the international and

¹⁷⁷ Katsumata believes that, despite their impressive reform plans, AMS have taken few concrete measures to implement them “simply because they are at heart disinclined to do so”. Hiro Katsumata, “ASEAN and human rights: resisting Western pressure or emulating the West?”, *The Pacific Review* 22 (2009): 619–637, at 629.

¹⁷⁸ Peace support operations in Southeast Asia would similarly be based on *ad hoc* foundations that rest upon bilateral or multilateral “coalitions of the willing”. McCoubrey, *supra* n.12, at 58.

¹⁷⁹ Established under UN Transitional Administration in East Timor (UNTAET) Regulation No.2000/15, the panels had exclusive jurisdiction over serious criminal offences. See UNTAET Reg. No.2000/15 of 5 July 2000.

¹⁸⁰ See paragraph 26, *Report of the Secretary-General on the United Nations Mission of Support in East Timor*, UN doc. S/2004/333 (2004).

¹⁸¹ See Suzannah Linton, “Prosecuting Atrocities at the District Court of Dili”, *Melbourne Journal of International Law* 2 (2001): 414-458.

national levels.

Given the 'ASEAN way' of making decisions through consultation and consensus, which typically results in the lowest common denominator that all AMS can unanimously accept, a regional solution in Southeast Asia logically needs to begin with a relatively low level of commitment, such as the affirmation of global ICL norms and practices. This approach not only acknowledges that the ASEAN Secretariat has limited resources, but also that AMS remain hesitant about adopting binding obligations. In its institutional capacity, ASEAN may then gradually consider coordinating the promotion of ICL-related conventions and instruments, as well as incorporating regional norms and practices.¹⁸² This will ensure that the regional mechanism will complement rather than conflict with international efforts. Such internally initiated promotional activities are less likely to upset the regional status quo, and thus more likely to be accepted and adopted by AMS compared to external pressure or insistence to ratify the ICC Statute.

The next step could be to create a consultative mechanism to discuss ICL within an ASEAN context, and develop cross-cultural consensus on goals and approaches.¹⁸³ Subsequently, regional monitoring procedures and commissions of inquiry can then be considered and implemented. Chesterman highlights that monitoring on a multitude of issues already takes place in many different forms within the ASEAN community, including implementation status reports by States, evaluations by the ASEAN Secretariat, and discussions at an ASEAN ministerial meeting.¹⁸⁴ Such regional monitoring serves various purposes.¹⁸⁵ Firstly, it ensures that AMS fulfil their regionally agreed obligations, ranging from strict treaty compliance to formal implementation in domestic legislation. Secondly, it fleshes out the exact content of the obligation, thereby providing the basis for a binding agreement in the future. Thirdly, it aids the implementation process in the longer term by determining the assistance required for State compliance. Last but not least, it

¹⁸² One possible solution is for ASEAN countries to internally develop a regional treaty on ICrimJ that is not only realistic and achievable, but most importantly endorsed by member States.

¹⁸³ Despite their non-ratification of the ICC Statute, continued engagement of AMS by the Court may then help "promote the internalization of norms" consistent with its aims. Kapur, *supra* n.7, at 1059.

¹⁸⁴ Chesterman notes that there has been a clear increase in the willingness of all AMS to monitor their mutual obligations. This is partly due to the general increase in comfort towards international obligations, and the need to confront specific collective action problems. Simon Chesterman, "Taking the ASEAN Community Seriously", *Straits Times*, 3 August 2013.

¹⁸⁵ See Simon Chesterman, "Introduction and Chapter One: From Community to Compliance?", *The Evolution of Monitoring Obligations in ASEAN* (Cambridge: Cambridge University Press, 2014). Forthcoming.

serves a symbolic purpose, indicating that an issue is considered important by the regional community of States in Southeast Asia.

Ultimately, regional monitoring of ICL commitments should entail greater respect for ICrimJ in Southeast Asia, as well as encourage acceptance and promote implementation at the domestic level. It is possible that situations could also be referred to a regional monitoring group or commission of inquiry created by ASEAN to investigate crimes that occur within member States. As outlined in Chapter 1, regional oversight and pressure will have greater influence on the concerned State(s), and may then deter outcomes like those in the Indonesian domestic trials for crimes against humanity committed in 1999 under its Ad Hoc Human Rights Tribunal for East Timor,¹⁸⁶ where concrete evidence of violations compiled by the Serious Crimes Unit of the UN Mission of Support in East Timor (UNMISSET) was disregarded.¹⁸⁷ While jurisdiction for criminal prosecutions will likely be assumed by the affected State(s), the regional mechanism may potentially also be able to oversee truth and reconciliation functions, as well as issues like amnesties and collective reparations¹⁸⁸. They not only serve as recognition of the crimes committed and the suffering of the victims, but also acknowledge a wider victim group, including those not involved in formal criminal proceedings. Such regional monitoring and non-judicial mechanisms may eventually lead to the acceptance for and establishment of a regional judicial organ able to issue authoritative and binding judgments against AMS or their nationals who commit serious regional crimes. This regional court could potentially also consider situations put forward by the AICHR. Victim participation schemes can possibly also be jointly designed and incorporated into both formal judicial and informal accountability processes.¹⁸⁹ The realisation of a regional criminal court in Southeast Asia will then rely on a high level of political acquiescence, as well as the

¹⁸⁶ Suzannah Linton, "Unravelling the First Three Trials at Indonesia's Ad Hoc Court for Human Rights Violations in East Timor", *Leiden Journal of International Law* 17 (2004):303-361.

¹⁸⁷ At least 10 Indonesian security personnel were acquitted by the Indonesian tribunal despite the evidence. As such, some suspect that the domestic trial was an attempt to ensure that the Indonesian military personnel could not be subjected to future hearings initiated by the international community. Toon, *supra* n.59, at 223.

¹⁸⁸ A Trust Fund for Victims, akin to that created by the ICC Statute, could be considered. This may provide the ICC with another opportunity to engage ASEAN and influence the development of ICrimJ norms.

¹⁸⁹ Victim participation may do more harm than good if it is not properly managed. Christine van den Wyngaert, "Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge", *Case Western Reserve Journal of International Law* 44 (2011): 475-496, at 494-496.

availability of resources and institutional infrastructure.¹⁹⁰

4.3 Conclusion

In developing a regional option, it should be noted that ICL is predominantly based on Western legal precepts of retributive justice and punishment, and a stringent and formalistic conception of ICrimJ overlooks the fact that States respond differently to various legal, political and economic pressures.¹⁹¹ A conscious effort must therefore be taken not to ignore restorative and indigenous conceptions of justice,¹⁹² or alternative mechanisms of accountability like TRCs and conditional amnesties.¹⁹³ Indeed, it is better to adopt the principle *fiat iustitia ne pereat mundus* (let justice be done, lest the world perish), than to strictly follow the maxim *fiat iustitia et pereat mundus* (let justice be done, though the world perish). Yet, this does not imply that criminal prosecution and sanctions are inappropriate modalities for holding individuals responsible for core international crimes. The reality is that maintaining international peace and preventing impunity are complex tasks, and it is inadvisable to simply dismiss any available option. Despite their contextual limitations, criminal trials must also remain an important and indispensable tool for the ICrimJ,¹⁹⁴ especially if States hope to develop both a credible regional alternative and extra layer to avoid ICC scrutiny. The corollary is that engagement of regional mechanisms by the ICC, as well as greater transparency and consistency in the articulation and

¹⁹⁰ In terms of relationship and interaction with the ICC, much will depend on the direction set by the AU push for the AfCHPR to prosecute international crimes on the continent.

¹⁹¹ Bass argues that not only is crucial flexibility lost when politics is linked to law, but a moralistic insistence on punishment may also make it impossible to negotiate with “bloodstained leaders who, however repulsive, might end a war”. Moreover, Drumbl notes that an unyielding focus on criminal prosecutions may consolidate belligerent group identities, prolong conflict, and undermine peace and reconciliation in dualist post-conflict societies. Bass, *supra* n.92, at 285; and Drumbl, *supra* n.134, at 1308.

¹⁹² Carlowitz notes that most international legal experts not only possess little understanding of local languages, structures, and legal systems, but also tend to ignore indigenous norms and values. Mani contends that ‘alien legal systems’ are thus designed and imposed on the recipient country with little or no domestic consultation. Leopold von Carlowitz, “Crossing the Boundary from the International to the Domestic Legal Realm: UNMIK Lawmaking and Property Rights in Kosovo”, *Global Governance* 10 (2004):307-331, at 319; and Rama Mani, “Conflict Resolution, Justice and the Law: Rebuilding the Rule of Law in the Aftermath of Complex Political Emergencies”, *International Peacekeeping* 5 (1998):1-25, at 7.

¹⁹³ See Lessa and Payne, *supra* n.138; Freeman, *supra* n.138; and Mallinder, *supra* n.138.

¹⁹⁴ Trial justice also serves an important symbolic role. By investigating the crime and prosecuting high-level offenders, the international community makes clear that it condemns the illegal actions and is determined to punish the guilty.

application of complementarity, would guide States to comply with the minimum standards set by the Court.

The notion of regionalising ICrimJ presents an opportunity to ‘think outside the box’ and make ICL increasingly responsive and relevant to specific needs on the ground. The techniques and processes to adopt in different regions may then be allowed to vary depending on existing legal values and norms, available resources and institutional infrastructure, as well as political considerations. The best conception of a regional solution for Southeast Asia is then a flexible and nuanced one, comprising of a blend of retributive and restorative justice, beginning as informal mechanisms that can develop into formal processes and perhaps even a permanent regional criminal court.¹⁹⁵ Separately, such regional initiatives will allow States to address serious crimes that are perhaps more pressing in their region – without the onerous and sometime debilitating need to achieve a global accord. In this connection, the next chapter will deliberate how a ‘regional crime’ may be constituted, and what could be such a crime in Southeast Asia.

¹⁹⁵ Weinstein and Stover argue that justice is most effective when it “works in consort with other processes of social reconstruction and reflects the needs and wishes of those most affected by violence”. Harvey Weinstein and Eric Stover, “Introduction: Conflict, Justice and Reclamation”, in Eric Stover and Harvey Weinstein, eds., *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge: Cambridge University Press, 2004), at 11.

CHAPTER 5

ESTABLISHING 'REGIONAL CRIMES' IN SOUTHEAST ASIA

The regionalisation of ICrimJ has been presented as an avenue for different parts of the world to adopt different techniques and processes based on local legal norms and values, political considerations of peace and stability, as well as available resources. In the previous chapter, the appropriate form(s) for a regional ICrimJ mechanism in Southeast Asia was discussed. This chapter will then proceed to deliberate what 'regional crimes' may fall within the jurisdiction of such a mechanism. Representing the most serious crimes of concern to the regional community, the requirements for regional crimes clearly cannot be simply derived from the cross-border nature and effects of the conduct, or that cooperation between countries in Southeast Asia is required to tackle the problem. In the same vein, not all transnational 'treaty crimes' between ASEAN member States (AMS) should equated with core international crimes, just because extraterritorial jurisdiction, extradition, and other collaborative efforts or mutual assistance between States are necessary to deter and prosecute the criminal elements.

Rather, the emphasis for the formulation of regional crimes must be focused on the fact that they will ultimately be determined by regional countries. Based on the insights gained from the concept of an international crime, it is recognised that the *opinio juris* of the global community of States ultimately determines what is considered an international crime. It is therefore logical and prudent to develop the notion of regional crimes in Southeast Asia from the perspective of ASEAN countries.¹ In this regard, the ILC discussions on what acts are deemed international crimes may prove illuminating because they not only chronicle the changing legal considerations since WWII,² but also reflect the differing political attitudes of States and vicissitudes of international *realpolitik*.³

¹ Some AMS are known to enter reservations that will significantly affect the applicability of international treaties. For example, Brunei and Malaysia subject their international obligations to Islamic and domestic law,

² This includes both the illuminating ILC discussions on the Draft Code of Offences (and later Crimes) against the Peace and Security of Mankind, as well as on State responsibility.

³ While it may be criticised, the conservative ILC approach to factor the comments and possible support from States is most reflective of their recognition and acceptance of various acts as international crimes.

Since the international community had already accepted several other acts as international crimes before the crystallisation of the ICC regime, regional crimes may not be limited to the crimes recognised by the Court. It is possible that additional regional crimes can also be culled from existing ‘treaty crimes’ with specific relevance in Southeast Asia. In this regard, the chapter considers whether a regional mechanism should be limited to coordinating the promotion and protection of ICL-related international treaties that all ten AMS have ratified. Alternatively, it could be mandated to incorporate regional conventions and instruments.⁴ It is noteworthy that although all AMS have ratified or acceded to the 1949 Geneva Conventions, only seven have signed the 1948 Genocide Convention.⁵ Nevertheless, given their international acceptance and established position as substantive law, it will be unnecessary to deliberate the validity and inclusion of genocide, crimes against humanity, and war crimes within an ASEAN ICrimJ mechanism. Given ASEAN’s role as a collective security organisation, there may also be regional interest in the definition of the crime of aggression adopted by the ICC.⁶ The first two sections of the chapter will thus survey the concept of an international crime and posit how the notion of a regional crime can be best developed, bearing in mind that it must appeal to self-interested sovereign States. Using the proposed criteria, the chapter then proposes some acts that may constitute and be labelled as regional crimes by the countries of Southeast Asia.

5.1 Surveying the Concept of an International Crime

Just after WWII, Schwarzenberger highlighted that the corpus of ICL still did not exist and there was no overarching supranational mechanism to enforce it.⁷ ICL has since developed as a branch of public international law, with attention most recently being focused on the ‘core crimes’ that fall within the jurisdiction of the ICC and entail individual criminal responsibility for their violations. The ICC Statute has not only

⁴ Boister points out that ICL is clearly subdivided into international crimes *stricto sensu* (“core crimes”) and crimes of international concern (“treaty crimes”). Neil Boister, “Transnational Criminal Law?”, *European Journal of International Law* 14 (2003):953-976.

⁵ The three countries that have not are Brunei, Indonesia, and Thailand.

⁶ The ICC has since defined the “crime of aggression” as the planning, preparation, initiation or execution of an act of using armed force by a State against the sovereignty, territorial integrity or political independence of another State.

⁷ Georg Schwarzenberger, “The Judgment of Nuremberg”, *Tulane Law Review* 21 (1947): 329-361 at 349.

offered more exhaustive definitions of some international crimes, but also served to codify various aspects of ICL. By dealing with ICL in a more coherent manner, the ICC has further provided an implicit doctrinal basis for the international criminalisation process.

Limiting crimes under the rubric of ICL to the current four ‘core crimes’ would however give an incomplete and distorted view of what constitutes an international crime. This is because the concept of an international crime has existed long before the crystallisation of the ICC regime,⁸ and several other acts had already been widely accepted by States as international crimes.⁹ For example, piracy is an international crime that had been recognised as early as the seventeenth century.¹⁰ All States have since been empowered to capture on the high seas and prosecute pirates, who are deemed *hostes humani generis* (enemies of humanity).¹¹ Considered a relic of legal history for much of the 20th century,¹² maritime piracy has been brought to the fore again with the recent attacks and threats to international shipping, particularly off the Somali coast.¹³ This development illustrates that it would be rash to discard older conceptions of international crimes and only focus on those that were the proverbial ‘flavour of the day’.

Another well-established example of an international crime that has become part of customary international law and attained *jus cogens* status is the prohibition

⁸ It is worth recalling that the ILC had proposed that ICC jurisdiction be “limited to crimes of an international character defined in specified international treaties in force”. Furthermore, the Final Act of Rome Conference also recommended (Resolution E) for a review conference to “consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court”. See Document A/CN.4/L.471, paras 4(b)-(c), in *Yearbook of the International Law Commission, 1992*, vol. II (Part Two), at 58.; commentaries on Article 20, in particular paras 18(a)-(b), in Document A/CN.4/L.491/Rev.2/Add.1, at 27-28; and A/CONF.183/10 (Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court) of 17 July 1998.

⁹ Bassiouni argues that sufficient legal basis existed to conclude that the following international crimes were even part of *jus cogens*: (1) aggression; (2) genocide; (3) crimes against humanity; (4) war crimes; (5) piracy; (6) slavery and slave-related practices; and (7) torture. M Cherif Bassiouni, “International Crimes: *Jus Cogens* and Obligation Erga Omnes”, *Law and Contemporary Problems* 59 (1996):63-74.

¹⁰ An example of a 17th century discussion of the ignominious act of piracy can be found in *De Iure Praedae* by Hugo Grotius. Hugo Grotius, *De Iure Praedae Commentarius [Commentary on the Law of Prize and Booty]*, trans. Gwladys Williams and Walter Zeydel (Oxford: Clarendon Press, 1950).

¹¹ This is in order for States to safeguard their shared interest to fight a common danger to the freedom of the high seas, as well as the damage to or loss of private property.

¹² This was partly reflected by the ILC decision to omit piracy, an international crime under customary international law, from the draft Code of Crimes (discussed in detail below) as it was doubtful that the offence would still constitute a threat to the peace and security of mankind. See *Yearbook of the International Law Commission, 1984*, vol. II (Part Two), para.65(c)(vi), at 17.

¹³ The relevance of maritime piracy in Southeast Asia is discussed later in this chapter.

against slavery and slave-related practices.¹⁴ Indeed, about 300 international agreements were estimated to have been implemented to suppress slavery between 1815 and 1957,¹⁵ and the ICJ even identified protection from slavery as an obligation *erga omnes* arising from the principles and rules concerning basic human rights.¹⁶ Like piracy, slavery in its contemporary forms may differ from historical practices, but remains no less relevant or important to the international community.¹⁷

An international crime that then developed in the post-WWII era is apartheid.¹⁸ The 1973 Apartheid Convention¹⁹ not only declares that apartheid is a crime against humanity,²⁰ but also states that inhuman acts resulting from such policies and practices of racial segregation and discrimination were “crimes violating the principles of international law” and constitutes “a serious threat to international peace and security”.²¹ Moreover, it adds that international criminal responsibility will apply to individuals.²² Bassiouni and Derby thus argue that the Apartheid Convention clearly defines apartheid as an international crime, and “although various states may feel the harmful effects of the crime, it is to be punished in the name of or on behalf of the world community”.²³ With the inclusion of apartheid as a crime within the ICC Statute (Articles 7(1)(j) and (2)(h)), claims that a customary rule on apartheid exists have been strengthened.²⁴

¹⁴ M Cherif Bassiouni, “Enslavement as an International Crime”, *New York University Journal of International Law and Politics* 23 (1991):445-517.

¹⁵ Office of the UN High Commissioner for Human Rights, *Abolishing Slavery and its Contemporary Forms*, UN Doc. HR/PUB/02/4, 2002.

¹⁶ *Barcelona Traction, Light and Power Co, Ltd (Belgium v. Spain) (Second Phase)*, Judgment of 5 February 1971: ICJ Rep 1970, at 32.

¹⁷ The 1926 *Slavery Convention* was the first to define slavery, criminalise the proscribed conduct (Article 6), and establish a duty to prosecute violations (Articles 2, 3, and 6). The 1956 *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* further obliged States parties to also abolish institutions and practices collectively identified as “servile status”. However, slavery in its contemporary forms remained prevalent, due in part to the evolution of slavery-like practices whilst the concept has stayed relatively static.

¹⁸ The crime of apartheid sprang from the UN opposition to the discriminatory racial policies of the South African Government (1948-1990), on the basis that they were contrary to Articles 55 and 56 of the UN Charter. It was annually condemned by the UNGA (1952-1990) and UNSC (after 1960).

¹⁹ Officially known as the *Convention on the Suppression and Punishment of the Crime of Apartheid*, it was adopted by the UNGA on 30 November 1973 and came into force on 18 July 1976.

²⁰ In 1966, the UNGA already characterised apartheid as a crime against humanity, a label that was also endorsed by the UNSC in 1984. See UN General Assembly Resolution 2202 (XXI) of 16 December 1966; and UN Security Council Resolution 556 of 23 October 1984, UN Doc. S/Res/556 (1984).

²¹ See Article 1, Apartheid Convention.

²² See Article 3, Apartheid Convention.

²³ M. Cherif Bassiouni and Daniel Derby, “Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant International Instruments”, *Hofstra Law Review* 9 (1981):523-592, at 533.

²⁴ Antonio Cassese, *International Criminal Law*, 3rd ed. (Oxford: Oxford University Press, 2012), at 107.

Based on these examples from three different past centuries, two points are patently obvious. First, the notion of an international crime must necessarily be larger than just the ‘core crimes’. (See Figure 1) Second, international crimes have been and continue to be defined by States according to the needs of their time, with effective enforcement only possible when an overriding mutual interest exists and *realpolitik* does not get in the way.²⁵ Given the politically driven and disjointed fashion in which the category of internationally prohibited acts developed over the centuries, there has been an insufficient body of international rules to elucidate the objective and subjective criteria for international crimes.²⁶



Figure 1

Consequently, there has been an unsurprising plethora of definitions and differing lists of international crimes. For example, Trainin considers an international crime to be “an infringement of the connection between States and peoples, a connection which constitutes the basis of relations between nations and countries”.²⁷ Separately, Pella notes that “actions or non-actions which violate the elementary principles considered as absolutely necessary for the maintenance of universal order and of international peace” were international infractions,²⁸ while Scelle argues that “any action which disturbed international public order was a crime under international law”.²⁹ These arguments support and highlight the underlying link between

²⁵ Indeed, Goldstone notes that the *ad hoc* international criminal tribunals of the 1990s “owed their very existence to political decisions”, and that other humanitarian crises that escaped scrutiny “were overlooked not necessarily because the atrocities were less heinous, but because of the crass political realities of international relations”. Richard Goldstone, *South-East Asia and International Criminal Law* (Oslo: Torkel Opsahl Academic EPublisher, 2011), at 8.

²⁶ The lack of any supranational judicial institution also meant that domestic legal systems were left to shape much of the substantive and procedural elements of ICL. Gideon Boas, James Bischoff, and Natalie Reid, *Elements of Crimes under International Law – International Criminal Law Practitioner Library Series Vol.II* (Cambridge: Cambridge University Press, 2008), at 8.

²⁷ Aron Trainin, *Hitlerite Responsibility under Criminal Law* (London: Hutchinson & Co., 1945), at 32.

²⁸ Vespasien V. Pella, *The Criminality of Wars of Aggression and the Organization of International Repressive Measures*, Report of the 1925 Inter-Parliamentary Union, XXIII Conference, Washington and Ottawa, 1-13 October 1925, at 103.

²⁹ Yearbook of the International Law Commission, 1949, vol. I, at 188.

international crimes and the ICrimJ goal of maintaining peace and security.³⁰

More recently, some scholars have used ‘international crimes’ to simply refer to the ‘core crimes’ that are within the jurisdiction of international courts or tribunals under general international law.³¹ Yet, another set of scholars contend that the laying down of various classes of crimes to be punished in the Statutes of international courts and tribunals were “simply a specification of the jurisdictional authority of the relevant court” and “did not purport to have a general reach”.³² Similarly, Bassiouni recognises that there are some international crimes that have achieved *jus cogens* status, and argues that it is more important that they are effectively criminally prosecuted than the type of legal forum before which they are adjudicated.³³ He nonetheless lists “twenty-five categories of international crimes”.³⁴ Separately, Van den Wyngaert identifies eighteen categories of international crimes based on international and European conventions since WWII.³⁵ In sum, there has been no ‘eureka moment’ in ICL, where a single definitive interpretation of what violations of international law are international crimes was found.

Yet, it is clear that not all transnational criminal activities should be elevated to the status of international crimes, let alone be deemed on par with the ‘core crimes’, simply because they attained global effect or reach.³⁶ If they represent the most serious crimes of concern to the international community, the requirements for international crimes must necessarily be set at a higher threshold. International crimes should thus not arise simply due to the different nationalities of the perpetrators and victims, the cross-border nature and effects of the conduct, or the fact that the

³⁰ A later subsection on peremptory norms will briefly discuss whether common interests and values deemed as *d’ordre public* by a society constitute an indicia (or criteria) for international crimes, and whether a notion of regional *jus cogens* can then be a term of reference for regional crimes.

³¹ For example, see Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, 2nd ed. (Cambridge: Cambridge University Press, 2011), at 4.

³² Antonio Cassese et al., *International Criminal Law – Cases and Commentary* (Oxford: Oxford University Press, 2011), at 115.

³³ M Cherif Bassiouni, “International Criminal Justice in Historical Perspective: The Tension Between States’ Interests and the Pursuit of International Justice”, in Antonio Cassese, ed., *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009), at 131. See also Bassiouni, *supra* n.9.

³⁴ Bassiouni identified his twenty-five international crimes out of 274 international conventions based on ten penal characteristics. See M Cherif Bassiouni, “The Sources and Content of International Criminal Law: A Theoretical Framework”, in M Cherif Bassiouni, ed., *International Criminal Law - Crimes*, 2nd ed. (New York: Transnational Publishers, 1999), at 32-33 and 47.

³⁵ See Christine Van den Wyngaert, ed., *International Criminal Law – A Collection of International and European Instruments* (The Hague: Martinus Nijhoff Publishers, 2005).

³⁶ Boister thus argues that ICL was subdivided into international criminal law *stricto sensu* (the so-called core crimes) and crimes of international concern (the so-called treaty crimes). Boister, *supra* n.4.

activities cannot be tackled without cooperation between States.³⁷ Neither should they arise because aspects of domestic criminal law are internationalised, like extraterritorial jurisdiction, extradition and other forms of cooperation between States to fight and prosecute criminal activity. This is because international crimes involve a discernible shift in their formation from the international level to the national level, and then “back again” to the international.³⁸ A return to the international level, after the international treaty and domestic legislation stages, does not occur in the case of transnational and other treaty crimes.³⁹

In essence, only international crimes attract individual criminal responsibility without intermediation of domestic law.⁴⁰ It is thus important to separate international crimes from transnational treaty crimes that have penal implications. (See Figure 2)

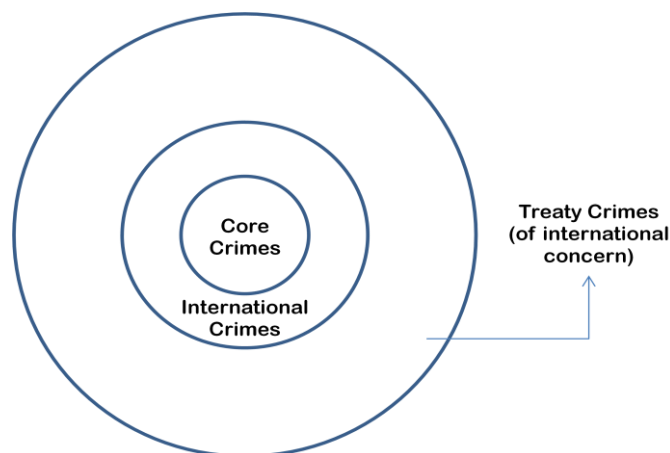


Figure 2

Indeed, while Yarnold listed twenty-two international crimes recognised by the international community, she was able to draw a distinction between those that were

³⁷ Although “cooperative relations between nations at the political and legal level” were required in the fight against these globally organised crimes, Rotman recognises that they are only ordinary transnational crimes. See Edgardo Rotman, “The Globalization of Criminal Violence”, *Cornell Journal of Law and Public Policy* 10 (2000): 1-43 at 38.

³⁸ Roelof Haveman, “The Context of the Law”, in Roelof Haveman, Olga Kavran and Julian Nicholls, eds., *Supranational Criminal Law: a System Sui Generis*, (Antwerp: Intersentia, 2003), at 25.

³⁹ While international treaties concerning transnational crime and other internationalised aspects of domestic criminal law might provide for cooperation between States on their enforcement, including the principle of *aut dedere aut judicare*, these would not be substantive components of the prohibited act but purely procedural rules. For a discussion on the principle of *aut dedere aut judicare* and some conventions establishing a duty to extradite or prosecute, see M Cherif Bassiouni and Edward Wise, *Aut Dedere Aut Judicare – The Duty to Extradite or Prosecute in International Law* (Dordrecht: Martinus Nijhoff Publishers, 1995).

⁴⁰ Cassese thus argued that international crimes were premised on the notion that international legal prescriptions were “capable of imposing obligations directly on individuals, without the intermediary of the state wielding authority over such individuals”. Cassese, *supra* n.24, at 3.

based on: (1) “an international element”, namely threats to peace and conduct that shocked the conscience of humanity; and (2) “a transnational element or an element of international necessity”, which were policy-motivated considerations to protect the interests of individual States.⁴¹

On that note, the key to understanding what constitutes an international crime perhaps lies at the heart of the phrase “most serious crimes of concern to the international community”.⁴² In this sense, States may not only have a universal interest in suppressing international crimes and punishing those who were responsible for them, but possibly also the jurisdiction to prosecute and punish those who committed such crimes.⁴³ Cassese similarly argues that international crimes are then international rules entailing the personal liability of the individual concerned, and results from the cumulative presence of four elements: (1) they consist of violations of international customary rules; (2) these rules protect values considered important by the whole international community and were consequently binding all States and individuals; (3) universal interest in repressing these crimes exists; and (4) individuals are barred from claiming immunity from prosecution. Under this more selective but still fairly wide definition, he identifies international crimes as the four ‘core crimes’, torture, and some extreme forms of international terrorism.⁴⁴ However, due to their impact at the transnational level, international terrorism and piracy were subsequently also added as “relevant crimes” within this definition.⁴⁵ This indicates that insisting on a ‘silver bullet’ fixed legal interpretation or definitive list of international crimes may be unproductive, particularly when States are not only left to define international crimes but also remain the *de facto* guardians against it.

That does not however mean that a doctrinal standard is irrelevant. Indeed, Yarnold highlights that only with such a standard can the international community decide “which conduct the international criminal law system should seek to prohibit in the future”.⁴⁶ The point is then that understanding international crimes must be done

⁴¹ Barbara Yarnold, “Doctrinal Basis for the International Criminalization Process”, *Temple International and Comparative Law Journal* 8 (1994): 85-115 at 113.

⁴² Paragraph 4, Preamble of the Rome Statute of the ICC.

⁴³ A following subsection will briefly discuss the concepts of obligations *erga omnes* and universal jurisdiction, and consider if they may be indicators of seriousness for international crimes and relevant for regional crimes.

⁴⁴ Cassese, *supra* n.24, at 21.

⁴⁵ Cassese, *supra* n.32, at 113-115.

⁴⁶ Barbara Yarnold, “The Doctrinal Basis for the International Criminalization Process”, in M Cherif Bassiouni, ed., *International Criminal Law - Crimes*, 2nd ed. (New York: Transnational Publishers, 1999), at 127.

from the perspective of States. In this regard, the various ILC discussions on the matter prove most illuminating. For example, the ILC not only had to take into account the comments from States in developing the draft Code of Offences against the Peace and Security of Mankind,⁴⁷ but also had its hands tied in terms of the progress that it could make.⁴⁸ When the draft Code was again debated in 1984, it was expanded beyond the offences in the 1954 draft Code⁴⁹ to cover other offences that reflected the international reality of the day.⁵⁰ The renamed draft Code of Crimes against the Peace and Security of Mankind⁵¹ that was adopted by the ILC in 1991 thus included several new offences.⁵² However, in response to the strong opposition, criticisms or reservations of various States,⁵³ the Special Rapporteur omitted six of the 12 crimes from the 13th report.⁵⁴

Due to the need to win acceptance by States, focus was then re-directed on the remaining crimes: aggression; genocide; systematic or mass violations of human rights; exceptionally serious war crimes; international terrorism; and illicit traffic in narcotic drugs.⁵⁵ These six crimes were left in the 1995 draft Code based on two key

⁴⁷ For example, see the 1954 report of Special Rapporteur Jean Spiropoulos. Document A/CN.4/85, in *Yearbook of the International Law Commission, 1954*, vol. II, at 112.

⁴⁸ The ILC was only invited by the UNGA in resolution 36/106 of 10 December 1981 to resume its work on the draft Code and to review it, after a considerable hiatus for much of the Cold War. See UNGA resolution 36/106 (Draft Code of Offences against the Peace and Security of Mankind).

⁴⁹ See Document A/2693, para.54, in *Yearbook of the International Law Commission, 1954*, vol. II, at 151-2.

⁵⁰ This was based on the second report by Special Rapporteur Thiam, which noted that “the concept of an international crime has acquired a greater degree of autonomy and covers all offences which seriously disturb international public order”. Besides offence in the earlier draft Code, other acts considered were: colonialism; apartheid; serious damage to the human environment; economic aggression; the use of atomic weapons; and mercenarism. See Document A/CN.4/377, in *Yearbook of the International Law Commission, 1984*, vol. II (Part One), at 89; and *Yearbook of the International Law Commission, 1984*, vol. II (Part Two), at 17.

⁵¹ In 1987, the ILC recommended that the English title be amended to “Draft Code of Crimes against the Peace and Security of Mankind”, a recommendation that was endorsed by the UNGA in resolution 42/151 of 7 December 1987. See *Yearbook of the International Law Commission, 1987*, vol. II (Part Two), para.65, at 13; and UNGA resolution 42/151 (Draft Code of Crimes against the Peace and Security of Mankind).

⁵² See *Yearbook of the International Law Commission, 1991*, vol. II (Part Two), at 95-97.

⁵³ A more restricted list than that adopted on first reading of the 1991 draft Code was wanted by the majority of States. Moreover, the convergence of “several political wills” proved difficult to achieve on many draft articles, and the Special Rapporteur was “forced to reduce the list proposed on first reading”. See Document A/CN.4/466, paras.4 and 6, in *Yearbook of the International Law Commission, 1995*, vol. II (Part One), at 35.

⁵⁴ These were: (1) the threat of aggression; (2) intervention; (3) colonial domination; (4) apartheid; (5) the recruitment, use, financing and training of mercenaries; and (6) wilful and severe damage to the environment. See Document A/CN.4/466, in *Yearbook of the International Law Commission, 1995*, vol. II (Part One), at 33.

⁵⁵ See *Yearbook of the International Law Commission, 1995*, vol. II (Part Two), paras.38 and 39, at 16.

criteria:⁵⁶ (1) extreme seriousness; and (2) international community recognition.⁵⁷ This not only signalled an emphasis on crimes that were well established in international law but more importantly also widely accepted by States.⁵⁸ At the end of the ILC debate on the draft Code in 1995, the Special Rapporteur nevertheless noted that “a consensus had clearly developed in favour of including at least four of them – those on aggression, genocide, war crimes and crimes against humanity”.⁵⁹ The final text of 20 draft articles constituting the Code of Crimes against the Peace and Security of Mankind was later adopted by the ILC with the following statement highlighting the need for State acceptance and support:

“With a view to reaching consensus, the Commission has considerably reduced the scope of the Code... in response to the interest of adoption of the Code and of obtaining support by Governments.”⁶⁰

In terms of its subsequent influence, it is noteworthy that when the UNGA expressed its appreciation to the ILC for completing the draft Code,⁶¹ the relevance of its work was highlighted to States participating in the ICC PrepCom.⁶² It was however again decided that, in order to achieve acceptance by States, the Court's jurisdiction would be limited to the four ‘core crimes’ that are unquestionably part of customary

⁵⁶ The Special Rapporteur opined that for an internationally wrongful act to become a crime under the Code, it must be extremely serious and the international community must decide that it is to be included. This was because extreme seriousness alone was too subjective a criterion and left room for considerable uncertainty, and other technical and political factors had to be taken into account in the drafting and adoption of a Code of Crimes against the Peace and Security of Mankind. See Document A/CN.4/466, para.4, in *Yearbook of the International Law Commission, 1995*, vol. II (Part One), at 35.

⁵⁷ This criterion of taking into account the views of the “international community as a whole” was considered to be theoretically justified because of its consistency with the closely related notions of *jus cogens* and of international crimes as defined in Article 19 of the draft on State responsibility. See *Yearbook of the International Law Commission, 1995*, vol. II (Part Two), para.56, at 19.

⁵⁸ The ILC was influenced by the ICTY Statute that affirmed various components of IHL as customary international law, as well as the report by the UN Secretary-General of 3 May 1993 that stated the ICTY would only “apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise”. See Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (1993), at para.34.

⁵⁹ The Special Rapporteur also noted that further consideration would be needed to determine if the “controversial crimes” of international terrorism and illicit traffic in narcotic drugs should be retained. See *Yearbook of the International Law Commission, 1995*, vol. II (Part Two), paras.130, 135 and 139, at 31-32.

⁶⁰ *Yearbook of the International Law Commission, 1996*, vol. II (Part Two), paras.45-46.

⁶¹ See UNGA resolution 51/160 of 16 December 1996 (Report of the ILC on the work of its 48th session).

⁶² In resolution 50/46 of 11 December 1995, the UNGA decided to establish the PrepCom to discuss further the major substantive and administrative issues arising out of the ILC draft statute. See UNGA resolution 50/46 of 11 December 1995 (Establishment of an International Criminal Court).

international law and recognised by all States.⁶³ This simply restated the reality, as captured throughout the ILC deliberations, that international crimes are only what the international community of States acknowledges them to be and is willing to enforce based on shared interests. This is also a vital point for any deliberations on identifying crimes within a regional context.

In sum, the Rome Statute does not address the full range of international criminal activity, and the jurisdiction of the ICC is currently limited to the four ‘core crimes’ that are of greatest universal concern to the international community. However, these crimes should not be representative of either the entire ICrimJ system or all criminal activities that States seek to collectively combat.⁶⁴ Indeed, “treaty crimes” with international or transnational effects are more prevalent and of wider concern to States, and addressing them through regional arrangements may offer several advantages. Firstly, regional concerns about a particular crime can more easily be translated into a treaty between regional States and more effectively enforced by a regional institution or collective action. Secondly, the regional institutional machinery or collection mechanism to deal with criminal activity of regional concerns will be better able to adapt to the changing regional environment and evolving concerns of the State parties. In this connection, there is value in examining the notion of a ‘regional crime’.

5.2 Constructing the Concept of a Regional Crime

Based on the foregoing discussion, which opines that ‘core crimes’ are a subset of ‘international crimes’ and distinguishes both from other ‘treaty crimes’ of international concern, the next part of this Chapter constructs the concept of a regional crime. The goal is to advance ICrimJ, while recognising different regional notions of justice and lessening sovereignty costs, thereby increasing the likelihood of winning State approval. To be of greatest practical viability and political acceptability to self-interested States, particularly those with a strong entrenched notion of state sovereignty and non-interference in Southeast Asia, the doctrinal standard for regional crimes should closely mirror that of international crimes derived from ILC deliberations as it most accurately reflects existing *opinio juris*. Focus is however then

⁶³ See Document A/CONF.183/9 (Rome Statute of the International Criminal Court) of 17 July 1998.

⁶⁴ Boister, *supra* n.4, at 975.

centred within a regional instead of a global setting,⁶⁵ with emphasis falling on two key criteria: (1) regional community recognition; and (2) ‘extreme seriousness’ within a regional context.

In this regard, regional crimes are logically a subset of transnational ‘treaty crimes’ particularly relevant or subscribed to within a specific region, but also necessarily include international crimes that are part of customary international law and cloaked by the *opinio juris* of the international community as a whole.⁶⁶ (See Figure 3.) This acknowledges that the status of an act as an international crime is not diminished if a State, or even entire region, refuses to recognise it.⁶⁷

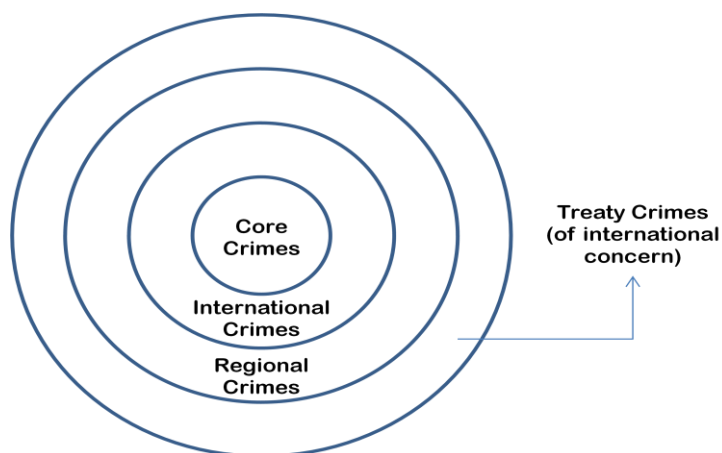


Figure 3

At this juncture, it is pertinent to underscore that like international crimes, regional crimes are envisaged to be ultimately committed by and thus solely ascribed to individuals.⁶⁸ If the doctrinal underpinnings of individual criminal responsibility and current State practice regarding international crimes are accepted as an appropriate guide, those accused of committing regional crimes should also be prevented from seeking the protection of State sovereignty and claiming immunity as agents of the

⁶⁵ This opens up the possibility for a regional crime to evolve into an international crime if adequate global recognition was attained.

⁶⁶ There can be no persistent objectors to the prohibition of an act considered an international crime under customary international law. Any regional *jus cogens* would then be understood as a set of ‘higher laws’ that are jointly considered acceptable by a group of regional States to serve shared social and political goals. See later discussion on obligations *erga omnes partes* and regional *jus cogens*.

⁶⁷ AMS would be unable to challenge the universal applicability of peremptory norms relating to international crimes. Amrita Kapur, “Asian Value v. The Paper Tiger: Dismantling the Threat to Asian Values Posed by the International Criminal Court”, *Journal of International Criminal Justice* 11 (2013): 1059-1090, at 1069.

⁶⁸ The notion of individual responsibility for international crimes was developed by the ILC based on the judgment of the Nuremberg Tribunal that crimes against international law “are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”. See Document A/1858, at para.52(c), in *Yearbook of the International Law Commission, 1951*, vol. II, at 134.

State. Furthermore, these individuals need not be the physical perpetrators of the conduct. As with international crimes, the masterminds and architects of the atrocities are likely to be considered most responsible for such violations.⁶⁹ It is noteworthy that, as part of their completion strategies, UNSC resolution 1534 (2004) called on the ICTY and ICTR to concentrate on the most senior leaders suspected of being most responsible for crimes within their jurisdictions.⁷⁰ While this ensured that impunity was prevented at the highest levels, it also reflected the practical constraints, political pressures, and financial limitations in addressing international crimes. These crucial considerations must be recalled when theorising about effectively enforcing ICL at the regional level.

5.2.1 Regional Community Recognition

The development of ICrimJ and concept of an international crime are tightly bound to State support. Given the consensual character of positivist international law, a necessary precondition to elevate an act to the level of an international crime will be the recognition and acceptance by the global community.⁷¹ The ILC had in fact identified this as a major aspect of the definition of international crimes.⁷² It is significant the ILC elaborated that for an internationally wrongful act to be recognised as an “international crime”, it must be accepted “by all the essential components of the international community” and not only by some particular group of States.⁷³ This bolsters the argument for recognising a category of regional crimes, which would resemble international crimes in doctrinal terms within a regional context but was not accepted as such by the entire international community. Such an approach to ICL may then be deemed as a form of “respect for regional legal traditions”.⁷⁴

⁶⁹ Some commentators noted that this approach was “clearly reflected in the charging elements” for international crimes, which hardly required the individual to personally commit the physical act. See Boas, *supra* n.26, at 372.

⁷⁰ On 6 April 2004, Rule 28(A) of the ICTY RPE was thus amended and required that the accused was “the most senior leaders suspected of being responsible”. See UN Security Council resolution 1534 of 26 March 2004, UN Doc. S/Res/1534 (2004); and Rule 28(A), ICTY Rules of Procedure and Evidence.

⁷¹ In preparing the 1994 Draft Statute for an ICC, the Working Group for example concluded that the jurisdiction of the Court should refer only to the most serious crimes of concern to the international community as a whole. See commentaries on Part 3 (Jurisdiction of the Court), in particular Article 20 (Jurisdiction of the Court in respect of specified crimes), in A/CN.4/L.491/Rev.2/Add.1.

⁷² The ILC noted that in order to be ‘objectively’ considered as an ‘international crime’ (albeit referring to ‘crimes’ of the State), an internationally wrongful act must be ‘subjectively’ recognised as a ‘crime’ by the international community as a whole. See *Yearbook of the International Law Commission, 1976*, vol. II (Part Two), para.61, at 119.

⁷³ See *Yearbook of the International Law Commission, 1976*, vol. II (Part Two), para 61, at 119.

⁷⁴ *Eritrea/Yemen Arbitration (Phase Two: Maritime Delimitation)*, 119 ILR, at 448.

The formation of local/regional customs⁷⁵ requires the particular act by one State to be accepted by another State(s) as an expression of a legal obligation or right.⁷⁶ In this regard, while consensus amongst the international community is required in the case of an international crime, a regional crime only requires the positive acceptance of two (or more) parties.⁷⁷ As a corollary, so long as it does not contravene an existing *jus cogens* norm, concerns about the legal basis of ‘regional crimes’, like *nullum crimen sine lege* challenges, can be addressed in the statute of a regional court or remedied with codification in a regional instrument.⁷⁸ This not only acknowledges the fact that States currently decide which conduct should be prohibited and how violations should be punished, but also allows for differing State and regional interests to be accommodated. It is noteworthy that treaty-based hybrid courts showed how conduct pertinent to a situation, like the recruitment and use in armed conflict of child soldiers, could be used to better interpret and expand on existing international crimes.⁷⁹

The primary condition for the existence of a regional crime in Southeast Asia should then be the recognition and acceptance by the regional community of AMS. The ASEAN Declaration on Transnational Crime serves as an instructive starting point.⁸⁰ Signed on 20 December 1997, the AMS identified a shared concern about the pernicious effects of several specific transnational crimes on “regional stability and development”, as well as “the welfare of the region's peoples”. They are: (1) terrorism; (2) illicit drug trafficking; (3) arms smuggling; (4) money laundering; (5)

⁷⁵ In the *Asylum Case*, the ICJ discussed the Colombian claim of a local/regional custom peculiar to the Latin American States, and held that different local and regional customs must be taken into account when deciding on the position of international law. It was then accepted in the *El Salvador/Honduras* case that a “trilateral local custom of the nature of a convention” could establish a condominium arrangement between three successor States. See *Colombian-Peruvian Asylum Case*, Judgment of 20 November 1950: ICJ Rep 1950, 266; and *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment of 11 September 1992: ICJ Rep 1992, at 597-600.

⁷⁶ In the *Case Concerning Right of Passage over Indian Territory*, the ICJ held that there was “no reason why long continued practice between two states accepted by them as regulating their relations should not form the basis of mutual rights and obligations between two states”. See *Case Concerning Right of Passage Over the Indian Territory (Merits)*, Judgment of 12 April 1960: ICJ Rep 1960, at 39.

⁷⁷ The standard required to prove the existence of a local/regional customs would however be higher than when a legal obligation or right is alleged under customary international law. See *Asylum Case*, *supra* n.75.

⁷⁸ Although this may be criticised as an ‘anything goes’ approach, it is actually reflective of how international treaties are in reality established and more importantly enforced between States.

⁷⁹ For a discussion on the SCSL and the crime of child recruitment, see Alison Smith, “Child Recruitment and the Special Court for Sierra Leone”, *Journal of International Criminal Justice* 2 (2004):1141-1153.

⁸⁰ See *ASEAN Declaration on Transnational Crime*, Manila, 20 December 1997.

traffic in persons; and (6) piracy. To combat these crimes, the AMS also stressed the need for clear and effective regional modalities, especially regarding information exchange and policy coordination.⁸¹ Such strengthening and coordination of cooperation amongst AMS, like that against the illicit drug trade, are further indications of it being a focus of the ASEAN community.⁸² Additional regional emphasis on specific crimes can also be deduced from the adoption or proposed establishment of treaty instruments like the ASEAN Convention on Counter-Terrorism (ACCT) and the ASEAN Convention on Trafficking in Persons (ACTIP). In sum, the emphasis and efforts by AMS to tackle these illegal acts help discern a regional crime through community recognition, and perhaps also by highlighting how ‘serious’ a threat the regional community deems they pose.

5.2.2 The Test of ‘Seriousness’

‘Seriousness’ has been identified on several occasions as an essential element of a crime against the peace and security of mankind for the purposes of the draft Code.⁸³ It was even suggested that acts belonging to the category of offences against the peace and security of mankind were all “marked by the same degree of extreme seriousness”.⁸⁴ Measured objectively, seriousness could be based on “transgressions against *rights, physical persons or property*”.⁸⁵ Accordingly, it has been used as a jurisdictional requirement for the prosecution of international crimes by international criminal tribunals,⁸⁶ and an element in the definition for various offences.⁸⁷

⁸¹ There have since been efforts at the level of the ASEAN Chief of National Police (ASEANAPOL) to harmonise and synergise cooperation among regional sectoral bodies combating various transnational crimes.

⁸² For example, the ASEAN Senior Officials on Drug Matters (ASOD) are working on bolstering regional framework and mainstreaming drug concerns in other relevant ASEAN Bodies, with the goal of achieving ASEAN Drug Free 2015.

⁸³ For example, in the 1983 debate on the first report of its newly appointed Special Rapporteur for the draft Code, Doudou Thiam, the ILC was of the opinion that the scope of the draft Code “should cover only the most serious international offences”. See *Yearbook of the International Law Commission, 1983*, vol. II (Part Two), para.69(a). Also see First Report on the Draft Code of Offences Against the Peace and Security of Mankind, Document A/CN.4/364; Third Report on the Draft Code of Offences Against the Peace and Security of Mankind, Document A/CN.4/387, para.38; and Thirteenth Report on the Draft Code of Crimes Against the Peace and Security of Mankind, Document A/CN.4/466, para.4.

⁸⁴ See Third Report on the Draft Code, *supra* n.83, para.38.

⁸⁵ *Ibid*, para.49.

⁸⁶ The ICTY, ICTR and SCSL jurisdictions are limited to “serious” violations of IHL, while the ICC jurisdiction is limited to the “most serious crimes of international concern”. See Article 1, ICTY Statute; Article 1, ICTR Statute; Article 1, SCSL Statute; and Article 1, ICC Statute.

⁸⁷ For example, crimes such as inhumane treatment and cruel treatment require the perpetrator’s act or omission to cause *serious* mental or physical suffering or injury, or to constitute a *serious* attack on human dignity. See *Prosecutor v. Mucić et al.*, Case No.: IT-96-21-A, Appeals Chamber, Judgment, 20 February 2001, at paras.424 and 426.

As *de facto* representatives of the international community, States may surmount the doctrine of sovereignty and exercise universal jurisdiction,⁸⁸ in order to defend common fundamental interests through criminal process.⁸⁹ The presence of universal jurisdiction *per se*, which exists in two forms reflecting its use based on either customary international law or treaty law,⁹⁰ is however an unreliable indicium of seriousness. In its permissive form, States are allowed (but not bound) under customary international law to exercise jurisdiction over specific crimes.⁹¹ Its mandatory form is only (undisputedly) manifested in a separate duty that arises *inter partes* through a treaty.⁹² Universal jurisdiction therefore does not in itself oblige States to investigate an international crime, extradite suspects, or prosecute individuals.⁹³ Its unsuitability as an indicator of the seriousness of an act is bolstered by the fact that States are generally reluctant to employ the concept as it is laden with

⁸⁸ Franck argues that fundamental rules of the international community and other ‘associative’ norms are preconditions to the recognition of sovereignty. Hence, protection of these rules and shared interests justifies any infringement of State sovereignty. See Thomas Franck, *Fairness in the International Legal System* (The Hague: Academy for International Law, 1993), at 57-61.

⁸⁹ Broomhall opines that the rationales underlying ICL also supports universal jurisdiction, especially since the alternatives are insufficient or inadequate to bring the perpetrators to justice. Ratner, Abrams and Bischoff similarly contend that only States and rest of the international community can “ensure that they are properly punished or otherwise assessed for their abuses”. See Bruce Broomhall, *International Justice and the International Criminal Court – Between Sovereignty and the Rule of Law* (Oxford: Oxford University Press, 2003), at 107; and Steven Ratner, Jason Abrams and James Bischoff, *Accountability for Human rights Atrocities in International Law – Beyond the Nuremberg Legacy*, 3rd ed. (Oxford: Oxford University Press, 2009), at 370.

⁹⁰ Some commentators however completely reject the notion of universal jurisdiction. For example, see Alfred Rubin, “Actio Popularis, Jus Cogens and Offences Erga Omnes”, *New England Law Review* 35 (2001):265-280.

⁹¹ For example, Scharf contends that customary international law does not lead to mandatory universal jurisdiction over international crimes. See Michael Scharf, “The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes”, *Law and Contemporary Problems* 59 (1996):41-61.

⁹² Suppression conventions specifying a regime of universal jurisdiction will define the crime and obligate States to fulfil their *aut dedere, aut judicare* obligation. Bassiouni thus notes that State practice shows “the duty to prosecute or extradite is more inchoate than established, other than when it arises out of specific treaty obligations”. See M Cherif Bassiouni, ed., *International Criminal Law*, 2nd ed. (Ardley: Transnational Publishers, 1998), at 13.

⁹³ An individual accused of a treaty crime will thus not have any “international responsibility”, and has to be prosecuted under domestic law. Broomhall, *supra* n.89, at 13.

a host of practical and political difficulties,⁹⁴ not least that its exercise is controversial and “may show a lack of international courtesy”.⁹⁵

As a subjective concept that affects “the very foundations of human society”, seriousness may then be deduced from: (1) the *character* of the act; (2) the *extent* of its effects; or (3) the *intention* of the perpetrator.⁹⁶ Jurisprudence from various international tribunals confirms that seriousness limits the scope of crimes, particularly acts enumerated as crimes against humanity.⁹⁷ In addition, the ICC Statute requires the Court to be satisfied that each case is of sufficient gravity to justify further action.⁹⁸ Specific to an individual case, the gravity threshold is read as requiring the conduct to be “either systematic or large-scale”, the degree of social alarm caused by the conduct, and if the accused is one of the most senior leaders most responsible for the crime.⁹⁹ While important for determining jurisdiction in individual cases, gravity is nevertheless not instructive of the seriousness of the crimes itself.¹⁰⁰ In this regard, the severity and intent of the breach will be less instructive than the

⁹⁴ Although the ICJ confirmed the obligation to either prosecute or extradite alleged perpetrators under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, it is only addressed at state parties to the convention. Spain then notably amended its domestic laws in March 2014 to curb the use of universal jurisdiction, *inter alia* because China stressed that investigations into former Chinese leaders for alleged genocide in Tibet could damage relations. This follows the decision of Belgium, under US pressure, to repeal its laws on universal jurisdiction in August 2003. See *Questions Concerning the Obligation to Prosecute or Extradite*, Judgement of 20 July 2012: ICJ Rep 2012, at 422.

⁹⁵ See Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Dissenting opinion of Judge ad hoc Van den Wyngaert, para.3.

⁹⁶ Document A/CN.4/404, in *Yearbook of the International Law Commission, 1987*, vol. II (Part One), at 2.

⁹⁷ The relative seriousness are evaluated in light of all factual circumstances including the nature of the act or omission, the context in which it occurred, the circumstances of the victim, and the effect on the victim. See *Prosecutor v. Martić*, Case No. IT-95-11-T, Trial Chamber, Judgment, 12 June 2007, at para.84; *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Trial Chamber, Judgment, 7 June 2001, para.92; and *Prosecutor v. Brima et al.*, Case No. SCSL-2004-16-T, Trial Chamber, Judgment, 20 June 2007, at para.699.

⁹⁸ See Article 17(1)(d), ICC Statute ; and Susana SaCouto and Katherine Cleary, “The Gravity Threshold of the International Criminal Court”, *American University International Law Review* 23 (2007):807-854.

⁹⁹ The ICC judges have however concluded that a strict interpretation of the gravity threshold could exclude certain crimes or defendants from the jurisdiction of the Court. A flexible approach on admissibility has then developed within ICC case law, based on mix of quantitative and qualitative factors. See Margaret Deguzman, “The International Criminal Court’s Gravity Jurisprudence at Ten”, *Washington University Global Studies Law Review* 12 (2013):475-486; *Situation in the Democratic Republic of Congo*, ICC-01/04-169, Judgment on the Prosecutor’s Appeal Against the Decision of Pre-Trial Chamber I Entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’, 13 July 2006; *Prosecutor v Bahar Idriss Abu Garda*, ICC-02/05-02/09, Decision on the Confirmation of Charges, 8 February 2010; and *Situation in the Republic of Kenya*, ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010.

¹⁰⁰ In the Ntaganda Arrest Warrant Appeal Judgement, the ICC Appeals Chamber held the subjective criterion of “social alarm” is not necessarily appropriate for the determination of the admissibility of a case. See ICC-01/04-169, *supra* n.99, paras.69-72.

nature of the obligation breached.¹⁰¹ The ILC therefore held that “[t]he more important the subject-matter (of special importance to the international community), the more serious the transgression”.¹⁰²

The seriousness of an act could also be “gauged according to the public conscience”, as reflected in the degree of shock and horror it provokes within the international community.¹⁰³ Indeed, the ‘conscience of mankind’ has often signalled the serious nature of an act and played a significant role in developing the law relating to international crimes. For example, the UDHR states that “disregard and contempt for human rights have resulted in barbarous acts which have outraged the *conscience of mankind*”.¹⁰⁴ The UNGA also declares in Resolution 96(I) on the crime of genocide that “denial of the right of existence shocks the *conscience of mankind*”.¹⁰⁵ The 1977 Additional Protocol I of the Geneva Conventions further refers to “the protection and authority of the principles of international law derived from ... dictates of *public conscience*”.¹⁰⁶ Last but not least, the Preamble to the ICC Rome Statute harks to “atrocities that deeply shock the *conscience of humanity*”.¹⁰⁷ This is also understood as the concept of ‘social alarm’ in the international community.¹⁰⁸

It is therefore conceivable that the seriousness of an act in the regional context may be similarly determined by the threat it poses to fundamental interests of the regional community or the extent that it outrages regional sensitivities. The next question is then what terms of reference should be used to decide the regional interests that are to be protected, or acts that will provoke shock and arouse horror within the

¹⁰¹ Although the severity of the breach (perhaps identified by its magnitude and savagery, large number, or the fact that a similar pattern was applied at different times and places) is important, the mass nature of the act in itself is perhaps not an accurate gauge of the seriousness of an act. Indeed, it is for example no longer a constituent element of a crime against humanity, which can now be committed against a single individual provided it is by reason of his race, nationality, religion, or political opinions. On the other hand, intent is often difficult to prove and therefore not always a conclusive indicator of seriousness.

¹⁰² See Third Report on the Draft Code, *supra* n.83, para.61.

¹⁰³ *Ibid*, para.47; and *Prosecutor v. Lubanga*, Case No.: ICC-01/04-01/06, Pre-Trial Chamber, Decision on the Prosecutor’s Application for a warrant of arrest, 10 February 2006, para.46.

¹⁰⁴ See Preamble, UDHR [Emphasis added].

¹⁰⁵ See General Assembly resolution 96 (I) of 11 December 1946 (The Crime of Genocide).

¹⁰⁶ See Article 1(2), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 [Emphasis added].

¹⁰⁷ See Preamble, ICC Statute [Emphasis added].

¹⁰⁸ See *Prosecutor v. Lubanga*, *supra* n.103, para.46; *Situation in the Democratic Republic of Congo*, *supra* n.99, para.56; William Schabas, “Prosecutorial Discretion and Gravity”, in Carsten Stahn and Göran Sluiter, eds., *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff, 2009), at 241; and Kevin Jon Heller, ‘Situational Gravity Under the Rome Statute’, in Carsten Stahn and Larissa van den Herik, eds., *Future Perspectives on International Criminal Justice* (The Hague: TMC Asser Press, 2010).

regional community. The twin goals of ICrimJ proffer some indication of what make certain acts intrinsically criminal from an international perspective. Ensuring (regional) peace and security, as well as humanitarian considerations of protecting people against atrocities may therefore also constitute good indicia of seriousness for regional crimes.

5.2.2.1 Peace and Security

After WWII, an unsurprising predilection to construe international crimes as threats to the collective security interests of the international community consequently emerged. This is reflected largely by the ILC commission efforts to create a draft Code of Crimes Against the Peace and Security of Mankind.¹⁰⁹ From the early stages, it was decided that the draft Code would “be limited to offences which contain a political element and which endanger or disturb the maintenance of international peace and security”.¹¹⁰ The ILC noted that offences against the peace and security of mankind would cover “transgressions arising from the breach of an obligation the subject-matter of which is of special importance to the international community”.¹¹¹ The ILC also elaborated that the expression ‘peace and security of mankind’ had “a certain unity, a certain comprehensiveness, linking the various offences”, even though each offence had its own special characteristics.¹¹² Spiropoulos posited that these acts could be defined by their character, which “normally would affect the international relations in a way dangerous for the maintenance of peace”.¹¹³ Thiam similarly suggested that international crimes were firstly the result of “a serious breach of an international obligation of essential importance for the maintenance of international peace and security”.¹¹⁴

¹⁰⁹ The ICL was first tasked by the UNGA to prepare a draft Code of Offences against the Peace and Security of Mankind in 1947. See General Assembly resolution 177 (II) of 21 November 1947 (Formulation of the principles recognized in the Charter of the Nurnberg Tribunal and in the judgment of the Tribunal).

¹¹⁰ The ILC therefore decided to omit other crimes such as piracy, trafficking of dangerous drugs, trafficking of women and children, slavery, counterfeiting of currency, and damage to submarine cables. See Document A/1858, at para.52(a), in *Yearbook of the International Law Commission, 1951*, vol. II, at 134.

¹¹¹ Third Report on the Draft Code, *supra* n.83, para.61.

¹¹² *Ibid*, para.38.

¹¹³ Spiropoulos stated that the “main characteristic of the offences in question is their highly political nature”. See Document A/CN.4/39, para.35, in *Yearbook of the International Law Commission, 1950*, vol. II, at 259.

¹¹⁴ See Third Report on the Draft Code, *supra* n.83, para.63.

Given that maintaining peace and security would also reflect regional interests, its violation should also serve as an indicator of the ‘seriousness’ for regional crimes. An important distinction had nevertheless been stressed between the two concepts of ‘international peace and security’ and ‘peace and security of mankind’.¹¹⁵ While the former was “synonymous with non-belligerence” and pegged to peaceful relations between States,¹¹⁶ the latter encompassed acts committed against peoples.¹¹⁷ Hence, protecting people against atrocities that shock the conscience of humanity may be another indicium of seriousness for international crimes.¹¹⁸

5.2.2.2 Protecting People against Atrocities

As ‘seriousness’ is relative and the nature of the act is seen as a determinant of an international crime, humanitarian considerations of safeguarding the human being are a useful indicium of seriousness for international crimes.¹¹⁹ The ICJ accordingly held in its *Reservations to the Genocide Convention* advisory opinion¹²⁰ that the Convention was “manifestly adopted for a purely humanitarian and civilizing purpose ... since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality”.¹²¹ The ICJ is noted to have said in the *South-West Africa cases*¹²² that humanitarian considerations are insufficient in themselves to generate legal rights and obligations even though all States have a vested interest in such matters.¹²³ The Court added that there must be more than a moral or humanitarian ideal, which had “no

¹¹⁵ In the third report on the Draft Code, the Special Rapporteur noted that the two expressions ‘international peace and security’ and ‘peace and security of mankind’ did not coincide exactly. *Ibid*, para.28.

¹¹⁶ This also referred to the avoidance of behaviour that was likely to endanger international peace and security. *Ibid*, para.71.

¹¹⁷ These included violations of human rights, humanitarian law, or genocide. *Ibid*, para.72, at 72.

¹¹⁸ See discussion below.

¹¹⁹ In the *Corfu Channel* case, Judge Alvarez argued that the characteristics of an ‘international delinquency’ were that it was an act contrary to the sentiments of humanity. Alvarez also noted that the notion of delinquency was a fundamental precept of international law that was introduced due to the “demands of the juridical consciousness of the peoples”. *Corfu Channel Case*, Judgment of 9 April 1949: ICJ Rep 1949, at 45.

¹²⁰ *Reservations to the Convention on Genocide*, Advisory Opinion of 28 May 1951: ICJ Rep 1951, 15.

¹²¹ *Ibid*, at 23.

¹²² *South West Africa Cases*, Second Phase, Judgment of 18 July 1966: ICJ Rep 1966, 6.

¹²³ The ICJ found that while humanitarian considerations “may constitute the inspirational basis for rules of law”, they “do not, however, in themselves amount to rules of law”. *Ibid*, para.50, at 34.

residual juridical content”.¹²⁴ In the *Case Concerning Military And Paramilitary Activities In And Against Nicaragua*,¹²⁵ the ICJ nevertheless acknowledged the fundamental principles of humanity encapsulated in IHL, and referred to them as a basis for responsibility.¹²⁶ In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*,¹²⁷ the ICJ similarly noted that “the most universally recognized humanitarian principles” were reflected by the extensive codification of humanitarian law, the extent of the accession of these treaties, and the fact that the denunciation clauses within these instruments had never been used.¹²⁸

This link between international crimes and humanitarian considerations of safeguarding the human being was confirmed in *Prosecutor v. Tadić (Jurisdiction)*,¹²⁹ where the ICTY found that “[p]rinciples and rules of humanitarian law reflect “elementary considerations of humanity” widely recognized as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition”.¹³⁰ In *Prosecutor v. Strugar*,¹³¹ the ICTY reiterated that the prohibition of attacks on civilians was an elementary rule governing the conduct of war, and added that “the purpose of this prohibition is not only to save lives of civilians, but also to spare them from the risk of being subjected to war atrocities”.¹³² Hence, humanitarian considerations of protecting people against atrocities is not just a useful indicator, but in fact an expanding marker of seriousness for international crimes.

On that note, although atrocities perpetrated during civil war and crimes against humanity that occur within State borders are clearly not international in character, the commission of acts committed by a State against its own citizens has

¹²⁴ The ICJ held that legal rights and obligations would exist only in so far as there was actual provision for them. In this connection, once an idea has expressed in the form of a particular regime or system, “its legal incidents are those of the regime or system”. *Ibid*, paras.51-54, at 34-35.

¹²⁵ *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment of 27 June 1986: ICJ Rep 1986, 14.

¹²⁶ The Court opined that Common Article 3 of the Geneva Conventions were rules that reflected what it had called “elementary considerations of humanity” in the Corfu Channel case. *Ibid*, para.218, at 113-114.

¹²⁷ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996: ICJ Rep 1996, 226.

¹²⁸ *Ibid*, para.82, at 258.

¹²⁹ *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

¹³⁰ *Ibid*, at para.129.

¹³¹ *Prosecutor v. Strugar*, Case No.: IT-01-42-T, Trial Chamber, Judgment, 31 January 2005.

¹³² The ICTY opined that the experiencing of such a risk was in itself a grave consequence of an unlawful attack, even if the civilian survived the attack with no physical injury. *Ibid*, at para.221.

also been increasingly deemed to be a matter of international and regional concern.¹³³ Partly due to political-legal considerations, however, emphasis is placed less on the nature of these acts and more on how they threaten international peace and security.¹³⁴ For example, a conflict within a State may be considered as a direct threat to international (and regional) peace and security, not least by spreading to neighbouring countries or leading to massive refugee flows across national borders.¹³⁵ Where a situation is clearly contained within State borders and classified strictly as an internal conflict, intervention by the international community may be justified on the basis that the humanitarian crisis within the State constitutes a threat to international peace and security.¹³⁶ This was supported by the ICTY in the case of *Prosecutor v. Tadić (Jurisdiction)*, where it held that an internal armed conflict would constitute a ‘threat to the peace’ based on “the settled practice of the Security Council and the common understanding of the United Nations membership in general”.¹³⁷ In this connection, it may be said that a threat to peace and security not only shores up claims but potentially drives and underlies arguments for protecting people against atrocities. Indeed, the first time the UNSC applied the Responsibility to Protect doctrine was in respect of the situation in Libya, where it authorised enforcement action under Chapter VII after determining that the situation constituted a threat to international

¹³³ Instead of relying on any ethical or moral basis, the more politically acceptable argument for intervention by the international community in the affairs of a sovereign State can then be found in contractarian political theory. By committing atrocities against its own citizens, the government of a State would have lost the legitimacy of political authority. As such, foreign humanitarian intervention is permissible to rescue the peoples of such “outlaw” States. In practice, this is evidenced in the RtoP doctrine, where international intervention is deemed appropriate when a State is unwilling or unable to halt or avert a humanitarian disaster. See John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999), at 79; and discussion on the underlying principle of non-intervention and the developing RtoP concept in Chapter 3.

¹³⁴ Since 1990, the UN then has demonstrated a willingness to take action in respect of internal conflicts which are deemed to pose a threat to international peace and security, even where the State concerned has not requested such action. Examples of such intervention include Somalia, Haiti, Liberia, and Rwanda. However, intervention based on purely humanitarian grounds, including under the RtoP doctrine, is unlikely to be authorised by the UNSC. This was evidenced by the veto by Russia and China for the UNSC resolution condemning the violence in Syria.

¹³⁵ In 1991, the UNSC condemned “the repression of the Iraqi civilian population in many parts of Iraq ... which led to a massive flow of refugees towards and across international frontiers and to cross-border incursions which threaten international peace and security in the region”, and demanded that Iraq immediately end this repression “as a contribution to removing the threat to international peace and security in the region”. See UN Security Council resolution 688 of 5 April 1991, UN Doc. S/Res/688 (1991).

¹³⁶ For example, the UNSC determined in resolution 794 that “the magnitude of the human tragedy caused by the conflict in Somalia ... constitutes a threat to international peace and security”. See UN Security Council resolution 794 of 3 December 1992, UN Doc. S/Res/794 (1992).

¹³⁷ The ICTY highlighted that “there is a common understanding, manifested by the subsequent practice of the membership of the United Nations at large, that the ‘threat to the peace’ of Article 39 may include, as one of its species, internal armed conflicts”. See *Prosecutor v. Tadić, supra* n.129, para.30.

peace and security.¹³⁸ As noted in Chapter 3, the linkage with ICrimJ is underscored by the earlier adoption by the UNSC of resolution 1970, which referred the Libyan situation to the Prosecutor of the ICC.¹³⁹

This evident interrelationship between the twin ICrimJ goals of protecting people against atrocities and ensuring peace and security therefore further attests that both are significant indicia of seriousness for international crimes, and accordingly relevant for regional crimes. Separately, it restates that the criteria of seriousness (in terms of either maintaining peace and security or protecting people against atrocities) is itself something to be determined and accepted in each instance by the international community as a whole.¹⁴⁰ The positivist nature of the international legal system and the *opinio juris* of States must then not be forgotten during the application of both the ‘seriousness’ criterion and its indicia to the notion of regional crimes.¹⁴¹ In this regard, it is worth considering if the interlinked notions of *jus cogens* and obligations *erga omnes* may also be appropriate terms of reference and potential indicia of seriousness.

5.2.2.3 *Jus Cogens*

The *jus cogens* concept was discussed in the ILC drafts¹⁴² and subsequently crystallised in Articles 53 and 64 of the Vienna Convention on the Law of Treaties.¹⁴³ This signalled a normative differentiation between two kinds of rules and legal obligations within the international legal system.¹⁴⁴ The content of *jus cogens* rules are deemed so imperative to the entire community of States that derogation is prohibited,

¹³⁸ UNSC resolution 1973 authorised “all necessary measures” to protect civilians and civilian populated areas under threat of attack and to enforce compliance with a no-fly zone. It is worth noting that the UNSC had earlier also adopted resolution 1970 referring the Libyan situation to the Prosecutor of the ICC, and that it was determined after a preliminary investigation that sufficient evidence existed to believe that crimes against humanity had been committed by the regime of Muammar Gaddafi. See UN Security Council resolution 1973 of 17 March 2011, UN Doc. S/Res/1973 (2011); and UN Security Council resolution 1970 of 26 February 2011, UN Doc. S/Res/1970 (2011).

¹³⁹ See UN Security Council resolution 1970, *supra* n.138.

¹⁴⁰ This partly explains why the international community turns a blind eye or shuns situations that may constitute a ‘threat to the peace’ or humanitarian atrocities.

¹⁴¹ Goldstone highlights that politics also plays a determinative role in whether or when the burgeoning RtoP doctrine will be implemented. This is evidenced in the case of Myanmar, where Russia and China argued that the situation in the country did not pose a threat to peace and security in the region, and vetoed the UNSC resolution that would have put the matter on the agenda of the Council. Goldstone, *supra* n.25, at 18.

¹⁴² See ILC Draft Article 50 in Yearbook of the International Law Commission, 1966, vol. II, at 247.

¹⁴³ Articles 53 and 64 of the Convention provided for the invalidity of treaties that conflicted with a peremptory norm of general international law. Thus, *jus cogens* encapsulates a similar rule of hierarchy that renders a conflicting (general) customary law invalid. See Vienna Convention on the Law of Treaties.

¹⁴⁴ See Yearbook of the International Law Commission, 1976, vol. II (Part One), para.99, at 32.

and the relationship of responsibility is not restricted only to the State(s) that committed the breach and injured State(s).¹⁴⁵ Despite their theoretical similarities, various scholars stress that *jus cogens* and international crimes are nevertheless different concepts and not necessarily connected.¹⁴⁶ Although both seek to protect certain imperatives and higher values, they serve different purposes at dissimilar levels in disparate areas of public international law. Indeed, the ILC states in its commentary on Article 19 of the Draft Articles on State Responsibility that “the category of international obligations admitting of no derogation is much broader than the category of obligations whose breach is necessarily an international crime.”¹⁴⁷

The overlap between the broad category of international crimes and *jus cogens* that sometimes appear is partly because both concepts are yet to be clearly defined and delimited.¹⁴⁸ In fact, the ILC intentionally avoided creating an authoritative list of *jus cogens* norms as it found “no simple criterion by which to identify a general rule of international law as having the character of *jus cogens*”,¹⁴⁹ and there remained no consensus on the criteria for inclusion on such a list.¹⁵⁰ This permitted the belief that *jus cogens* can serve the aspiration of holding the positivist system of international law controlled by sovereign States accountable to a global society, whose fundamental interests are instead the security and well-being of all mankind.¹⁵¹

This view was undoubtedly supported by early ICJ pronouncements that such obligations of States can be founded on general and well-recognised principles including “elementary considerations of humanity”,¹⁵² and are binding on States “even

¹⁴⁵ The fact these “specially important” content of international obligations affected the international society thus: (1) precluded any possibility of derogation from the rules imposing such obligations by virtue of special agreements; and (2) rendered a breach of these obligations more serious than failure to comply with other obligations. *Ibid*, para.101.

¹⁴⁶ For example, Abi-Saab argues that the difference between *jus cogens* and international crimes is a result of defining *jus cogens* rules “by the mere effect” of their being non-derogable by agreement. He contends that acts which constitute international crimes and entail “differentiated treatment” are therefore more narrowly defined than *jus cogens* rules. Georges Abi-Saab, “The Uses of Article 19”, *European Journal of International Law* 10 (1999):339-351, at 348.

¹⁴⁷ See *Yearbook of the International Law Commission, 1976*, vol. II (Part Two), para.62.

¹⁴⁸ Bassiouni, *supra* n.9.

¹⁴⁹ *Yearbook of the International Law Commission, 1966*, vol. II, para.2.

¹⁵⁰ The ILC however recently noted that some prohibited acts were often cited as candidates for *jus cogens* status: (1) aggressive use of force; (2) genocide; (3) crimes against humanity; (4) torture; (5) slavery and slave trade; (6) piracy; (7) racial discrimination and *apartheid*, and (8) hostilities directed at civilian population. See Document A/CN.4/L.682 (2006), para.374.

¹⁵¹ See Gordon Christenson, “*Jus Cogens: Guarding Interests Fundamental to International Society*”, *Virginia Journal of International Law* 28 (1988):585-648.

¹⁵² *Corfu Channel Case*, *supra* n.119, at 22.

without any conventional obligation”.¹⁵³ In this vein, Bassiouni argues that if a crime threatens the peace and security of humankind and shocks the conscience of humanity, “it can be concluded that it is part of *jus cogens*”.¹⁵⁴ This broader stance that *jus cogens* is not just about rules or principles required for the international legal system to exist and function but also about the substance of rules appears to have gained traction.¹⁵⁵ Indeed, the ILC has since noted that *jus cogens* is “recognized in international practice, in the jurisprudence of international and national courts and tribunals and in legal doctrine”,¹⁵⁶ which includes the ICJ reference to fundamental humanitarian law rules constituting “intransgressible principles of international customary law”.¹⁵⁷

That said, acceptance and recognition of a *jus cogens* rule ultimately remains and reflects the will of States.¹⁵⁸ In this regard, a regional application of the *jus cogens* principles then becomes relevant. Grounded in legal positivism, the concept is not simply *jus cogens* norms within a regional setting. Rather, regional *jus cogens* are peremptory norms based on a regional set of ‘higher laws’ of overriding importance, which are intentionally and overtly deemed acceptable within a specific time-period by a group of regional States to serve certain social and political tasks.¹⁵⁹ Hence, while it is debatable whether *jus cogens* can constitute an indicia (or even criteria) for international crimes, such a politically amenable and practical conceptualisation of regional *jus cogens* can function as a term of reference of seriousness for regional crimes. It not only specifies a set of norms that are of fundamental interest to a regional community, but also highlights the underlying objectives of those States in proscribing certain acts.

¹⁵³ *Reservations to the Convention on Genocide*, Advisory Opinion of 28 May 1951: ICJ Rep 1951, at 23.

¹⁵⁴ Bassiouni, *supra* n.9, at 69.

¹⁵⁵ Ragazzi argues that a narrow view of *jus cogens* existing only at the systemic level was simplistic and did not take proper account of the expansion of the concept, which went “well beyond the law of treaties”. Separately, Orakhelashvili contends that *jus cogens* is a comprehensive phenomenon rooted in natural law, which has effects across the international legal system and is not just confined to treaties. See Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford: Clarendon Press, 1997), at 203; and Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2006).

¹⁵⁶ See Yearbook of the International Law Commission, 2001, vol. II (Part Two), para.2.

¹⁵⁷ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996: ICJ Rep 1996, para.79..

¹⁵⁸ This is particularly true as international law represents “the minimal law necessary to enable state-societies to act as closed systems internally and to act as territory owners in relation to each other”. Philip Allott, *Eunomia: New Order for a New World* (Oxford: Oxford University Press, 1990), at 324.

¹⁵⁹ Hasmath believed that such regional *jus cogens* norms could then be replaced by a “super-norm”, or eliminated entirely by the passing of its usefulness. Reza Hasmath, “The Utility of Regional *Jus Cogens* in International Law”, Working Paper (July 2004), at 8. Available at <http://ssrn.com/abstract=1366803>.

5.2.2.4 Obligations *Erga Omnes*

The ICTY defined obligations *erga omnes*¹⁶⁰ as “obligations owed towards all the other members of the international community ... the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued”.¹⁶¹ This was corroborated by the ILC in Article 48 of the 2001 Articles on Responsibility of States for International Wrongful Acts, which provided for ‘invocation of responsibility by a State other than an injured State’.¹⁶²

In this vein, the focus of this discussion is not obligations *erga omnes* for which “the international community as a whole” has a legal interest. Rather, the more relevant concept is obligations *erga omnes partes*¹⁶³ that are essentially created in treaties and owed by State parties to each other in reciprocal relationships.¹⁶⁴ This more limited version of the concept is highlighted by the ILC in Article 48(1)(a) of the ILC Articles on State Responsibility, which entitles non-injured States to invoke the responsibility of another treaty party if the specific obligation breached meets two conditions.¹⁶⁵ Firstly, the obligation is owed to a group of States that includes the invoking State.¹⁶⁶ Secondly, the obligation is established to protect a “collective interest of the group”, which is above the individual interests of any State

¹⁶⁰ Obligations *erga omnes* received prominence in the *Barcelona Traction* case. See *Barcelona Traction* case, *supra* n.16, at paras.33-34.

¹⁶¹ *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998, para.151.

¹⁶² See commentary on Article 48 in Report of the ILC on the work of its fifty-third session, 1 May-9 June and 10 July-18 August, UN doc. A/55/10, reproduced in *Yearbook of the International Law Commission, 2001*, vol. II (Part Two), at 126-128.

¹⁶³ See Linos-Alexander Sicilianos, “The Classification of Obligations and the Multilateral Dimensions of the Relations of International Responsibility”, *European Journal of Internal Law* 13 (2002): 1127-1145; Erika de Wet, “The International Constitutional Order”, *International Criminal Law Quarterly* 55 (2006): 51-76, hereafter ‘De Wet (2006a)’; and Erika de Wet, “The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order”, *Leiden Journal of International Law* 19 (2006): 611-632, hereafter ‘De Wet (2006b)’.

¹⁶⁴ The ILC had made a distinction between treaties that: (1) created “a more absolute type of obligation” that had an “integral” or “interdependent” character (obligations *erga omnes* proper); and (2) only created obligations that were owed by signatory States to each other (obligations *erga omnes partes*). See *Yearbook of the International Law Commission, 1958*, vol. II, para.91, at 44.

¹⁶⁵ See commentary on Article 48(1)(a) in ILC Report, *supra* n.162, at 126-127.

¹⁶⁶ As *erga omnes partes* entitlements were held by all the parties to a treaty, they could in principle only be transferred or modified by agreement of all of its holders. Joost Pauwelyn, “How Strongly Should We Protect and Enforce International Law”, *Duke Law School Faculty Scholarship Series Paper* 44 (2006), at 18.

concerned.¹⁶⁷ As no distinction is made between the sources of international law,¹⁶⁸ obligations *erga omnes partes* can be derived from multilateral treaties and customary international law.¹⁶⁹ Such “collective obligations” may then concern the security of a region or protection of human rights.¹⁷⁰

With regards to obligations stemming from international criminal law conventions, they will have *erga omnes partes* effect towards other States parties, and *erga omnes* effect to the extent that they are recognised as customary international law.¹⁷¹ Institutionalising international criminal responsibility in international instruments like the ICC Statute may only marginally improve the enforcement of *erga omnes* obligations.¹⁷² Nevertheless, treaties creating obligations *erga omnes partes* undoubtedly provide State parties with a stronger entitlement to claim responsibility of another State in a breach than States acting *erga omnes*.¹⁷³ This means that a multilateral agreement on regional crimes stands a better chance of being legally enforced than a demand between neighbouring States based purely on customary international law.

In sum, obligations *erga omnes partes* should feature in considerations of regional crimes and may serve as a further indicium of ‘seriousness’, particularly if they promote and protect the collective interest of a regional grouping of States. This builds on the argument that the emphasis and efforts by AMS to tackle selected illegal acts help identify a regional crime through community recognition, and by stressing how ‘serious’ a threat the regional community deems they pose. For example, convinced that the global fight against several specific transnational crimes, which were of particular relevance in Southeast Asia, rested on consolidated regional action

¹⁶⁷ De Wet contends that the obligation in the ECHR have then evolved from *erga omnes partes* obligations into regional customary law and arguably into regional *jus cogens norms*. De Wet (2006b), *supra* n.163, at 617.

¹⁶⁸ See *Yearbook of the International Law Commission, 2001*, vol. II (Part Two), para.6.

¹⁶⁹ Tams however stresses that the legal regime governing obligations *erga omnes partes* then “depend on the terms of the treaty of which they form part”, while Johnstone highlights that State invocation of the responsibility of another state under obligations *erga omnes partes* is tied on the violation of a treaty. See Christian Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: Cambridge University Press, 2005), at 125; and Rachael Johnstone, “State Responsibility: A Concerto For Court, Council and Committee”, *Denver Journal of International Law and Policy* 63 (2008):63-117, at 109.

¹⁷⁰ See *Yearbook of the International Law Commission, 2001*, vol. II (Part Two), para.7, at 126.

¹⁷¹ De Wet argues that this included the obligations articulated in the ICC Statute, which granted the Court jurisdiction over the most serious crimes of concern to the ‘international community as a whole’. De Wet (2006a), *supra* n.163, at 55.

¹⁷² Karl Zemanek, “New Trends in the Enforcement of *Erga Omnes* Obligations”, *Max Planck Yearbook of United Nations Law* 4 (2000):1-52, at 25.

¹⁷³ Annemarieke Vermeer-Künzli, “A Matter of Interest: Diplomatic Protection and State Responsibility *Erga Omnes*”, *International Comparative Law Quarterly* 56 (2007):553-582 at 575.

in both the institutional and operational spheres, AMS **have resolved to adopt various measures.**¹⁷⁴ **These *inter alia* included: (1) strengthening** AMS commitment to regional cooperation in combating the identified transnational crimes; (2) holding discussions with a view to signing mutual legal assistance agreements, bilateral treaties, memorandum of understanding or other arrangements among member States; (3) expanding the scope of efforts against the specified crimes and including them in the work of the ASEAN Secretariat; (4) greater cooperation and coordination with other ASEAN bodies in the investigations, prosecution and rehabilitation of perpetrators of such crimes; and (5) **bolstering** the capacity of the ASEAN Secretariat to assist AMS in initiating, planning, and coordinating activities, strategies, programmes and projects to combat these crimes.

5.3 Maritime Piracy in Southeast Asia

As noted above, ASEAN already has a list of crimes that are seen to pose a threat to peace, security and stability of the region also exists,¹⁷⁵ and for which practical collaboration has since been developed by AMS.¹⁷⁶ There has in fact been a stepping up of efforts and cooperation in the prevention and eradication of these crimes.¹⁷⁷ For the period of 2013-2015, ASEAN has identified eight areas of focus, namely: counter-terrorism, trafficking in persons, illicit drug trafficking, money laundering, sea piracy, arms smuggling, international economic crime, and cybercrime.¹⁷⁸ It is possible that some of these prohibited activities can be elevated to the level of a regional crime since there is regional community recognition, and they are considered to be extremely serious problems within the context of Southeast Asia. They are all already

¹⁷⁴ For example, see *ASEAN Plan of Action to Combat Transnational Crime*, Yangon, 23 June 1999.

¹⁷⁵ For example, the 8th ASEAN Ministerial Meeting on Transnational Crime (AMMTC) held in October 2011 noted that money laundering and terrorism financing issues were the backbone of most criminal activities that threatened regional peace, security and stability. See Joint Statement of the Eighth ASEAN Ministerial Meeting on Transnational Crime (8th AMMTC), Bali, 11 October 2011.

¹⁷⁶ The 12th ASEAN Senior Officials Meeting on Transnational Crime (SOMTC) in September 2012 stated that future projects and activities in combating transnational crimes would also cover international economic crimes and cybercrime.

¹⁷⁷ See ASEAN Secretariat, "ASEAN Steps Up Efforts to Combat Transnational Crime", ASEAN Secretariat News, 25 September 2012, at <http://www.asean.org/news/asean-secretariat-news/item/asean-steps-up-efforts-to-combat-transnational-crime>.

¹⁷⁸ This is an expansion of the 1997 ASEAN Declaration on Transnational Crime, which had identified the first six transnational crimes as having a pernicious effect on "regional stability and development", as well as "the welfare of the region's peoples". Although considered soft law, these statements together with the *ASEAN Plan of Action to Combat Transnational Crime* and subsequent ASEAN efforts could form the basis of selecting regional crimes in Southeast Asia. See ASEAN Declaration, *supra* 80; and ASEAN Plan of Action, *supra* n.174.

emphatically deemed by AMS to be threats to regional peace and security, while some may attract obligations *erga omnes partes* or even fall under regional *jus cogens*.

Maritime piracy is the leading contender to be considered a regional crime in Southeast Asia.¹⁷⁹ Not only has it been recognised as an international crime for several centuries, it is a potential example of regional *jus cogens* that reflects the fundamental interest of AMS and highlight their underlying objectives for proscribing regional crimes. Southeast Asia is “distinctively maritime” due to its geography and relative lack of land-based transport infrastructure, and shipping is unquestionably important to the region.¹⁸⁰ As a corollary, maritime piracy has been a perennial problem for seafarers,¹⁸¹ and remains a serious threat to international shipping and commerce due to the many small islands and narrow waterways that form its archipelagic nature.¹⁸² According to the International Maritime Bureau (IMB), out of 264 attacks reported globally, 128 occurred in Southeast Asia in 2013.¹⁸³ Given that the Straits of Malacca is the shortest sea route between the Indian and Pacific Oceans, the importance of the free flow of ships and goods through regional waters cannot be overstated. It is estimated that over 60,000 vessels transit the Malacca Straits annually, carrying about one-third of global trade, including one-third of global crude oil and over half of global liquefied natural gas.¹⁸⁴ For example, 85% of China’s imports flows through Southeast Asian waters, including 80% of its energy imports.¹⁸⁵ Frequent attacks on

¹⁷⁹ Another plausible ‘regional crime’ to be added by an ASEAN ICrimJ initiative may be illicit traffic in narcotic drugs, which was left in the 1995 ILC draft Code of Crimes because it was deemed to have met the two key criteria: (1) extreme seriousness; and (2) international community recognition. See *Yearbook of the International Law Commission, 1995*, vol. II (Part Two), paras.38-39.

¹⁸⁰ Sam Bateman, Joshua Ho and Jane Chan, “Good Order at Sea in Southeast Asia”, *RSIS Policy Paper*, April 2009, at 4.

¹⁸¹ The importance of the piracy issue however grew in the 1990s due to: (1) an increase in attacks, in some cases linked to the political instability and economic turmoil following the 1997 Asian financial crisis; (2) several high profile attacks in the region; (3) a more systematic collection of maritime crime statistics, including the establishment by the International Maritime Bureau (IMB) of a Piracy Reporting Centre (IMB-PRC) in Kuala Lumpur in 1992; (4) greater tendency among the shipping community to report attacks; and (5) a new focus on non-traditional security threats in the post-Cold War era. See Ian Storey, “Securing Southeast Asia’s Sea Lanes: A Work in Progress”, *Asia Policy* 6 (2008): 95-127, at 98; and Robert Beckman and J Ashley Roach, eds., *Piracy and International Maritime Crime in ASEAN: Prospects for Cooperation* (Cheltenham: Edward Elgar, 2012).

¹⁸² Besides the Malacca Straits, the ‘triborder sea’ between Indonesia, Malaysia, and the Philippines is another hotspot for piracy. See Storey, *supra* n.181, at 104.

¹⁸³ The attacks occurred in Indonesian coastal waters (106); the Malacca Straits (1); Malaysian waters (9); Philippines waters (3); and the Singapore Straits (9). ICC International Maritime Bureau, “Piracy and Armed Robbery Against Ships: Report for the Period 1 January – 31 December 2013”, January 2014.

¹⁸⁴ See US Energy Information Administration, “World Oil Chokepoints”, August 2012, at http://www.eia.gov/countries/analysisbriefs/World_Oil_Transit_Chokepoints/wotc.pdf.

¹⁸⁵ For a discussion, see Karsten von Hoesslin, “Piracy and Armed Robbery against Ships in the ASEAN Region: Incidents and Trends”, in Beckman, *supra* n.181.

ships passing through the region would thus not only hamper international trade and affect the world economy, but could also cause billions of dollars in economic loss.¹⁸⁶

Given the harm that maritime piracy can inflict on the trading interests and economic wellbeing of all States, as noted earlier, the international community has long treated piracy as a universal crime whose perpetrators are subject to punishment by any nation that apprehends them.¹⁸⁷ Piracy was defined in the Geneva Convention of the High Seas in 1958,¹⁸⁸ and replicated in the UN Convention on the Law of the Sea (UNCLOS) that was signed in 1982 and entered into force in 1994.¹⁸⁹ The definitional requirement for piratical attacks to serve “private ends” restricts it to acts committed with the intent to rob, and underscores the unwillingness by States to permit universal jurisdiction over politically motivated acts.¹⁹⁰ In 1988, the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation¹⁹¹ established a legal basis for prosecuting various maritime crimes that did not fall within the UNCLOS piracy framework,¹⁹² including acts of terrorism.¹⁹³ However, such crimes are clearly distinct from the universal crime of piracy, and entail no real *aut dedere aut judicare* obligations.¹⁹⁴ It is thus clear that while treaties against maritime crime increasingly require State parties to cooperate in line with suppression objectives, territorial sovereignty continues to be the overriding fundamental principle.¹⁹⁵

All AMS except Cambodia are parties to UNCLOS, but three countries along the Malacca Straits (Indonesia, Malaysia and Thailand) are not parties to the Rome

¹⁸⁶ Erik Barrios, “Casting a Wider Net: Addressing the Maritime Piracy Problem in Southeast Asia”, *Boston College International and Comparative Law Review* 28 (2005): 149-163.

¹⁸⁷ See John Williams and Hersch Lauterpacht, eds., *Annual Digest of Public International Law Cases: Years 1919–1922*, (London: Longmans, Green and Co., 1932), at 165.

¹⁸⁸ See Article 15, *Convention on the High Seas*, 29 April 1958.

¹⁸⁹ See Article 101, *United Nations Convention on the Law of the Sea*, 10 December 1982.

¹⁹⁰ Tina Garmon, “International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th”, *Tulane Maritime Law Journal* 27 (2002): 257-275, at 265.

¹⁹¹ See *Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 10 March 1988.

¹⁹² For a discussion, see Malvina Halberstam, “Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety”, *American Journal of International Law* 82 (1998): 269-310.

¹⁹³ Since 11 September 2001, piracy has increasingly been conflated with the issue of terrorism. However, maritime terrorist attacks accounts for only 2% of all terrorist incidents over the last three decades. Storey, *supra* n.181, at 99.

¹⁹⁴ Tullio Treves, “Safety of Maritime Navigation: The Rome Convention”, *Singapore Journal of International and Comparative Law* (1998): 541-556, at 550-551

¹⁹⁵ States prefer not to authorise requests by another State for direct exercise of enforcement powers within its territory. See Cheah Wui Ling, “Maritime Crimes and the Problem of Cross-Border Enforcement: Making the Most of Existing Multilateral Instruments”, in Beckman, *supra* n.181, at 232.

Convention.¹⁹⁶ Besides sovereignty issues, shortcomings of international law regarding piracy and maritime crimes with respect to Southeast Asia exist,¹⁹⁷ including the fact that piracy can only occur on the high seas or in a state's exclusive economic zone.¹⁹⁸ Various regional treaties like the 2004 Treaty on Mutual Legal Assistance in Criminal Matters and 2007 ASEAN Convention on Counter-Terrorism have then been adopted to allow AMS to assist in cross-border investigations and have enforcement capabilities to address terrorism.¹⁹⁹ As opposed to exclusive reliance on UNCLOS, Beckman highlights that regional States can work towards a regional agreement,²⁰⁰ while Goodman notes that regional initiatives allow a smaller grouping of States to create and enforce anti-piracy measures tailored to the unique situations of a given region.²⁰¹ The Malaysia-Singapore-Indonesia (MALSINDO) coordinated patrols in the Malacca Straits is an example of such initiatives to address piracy in regional waters.²⁰² In September 2005, maritime air patrols codenamed Eyes in the Sky (EiS) were launched to increase the coverage and effectiveness of MALSINDO.²⁰³ The coordinated sea patrols and EiS were subsequently unified under the Malacca Straits Patrols (MSP) in April 2006.²⁰⁴

These cooperative efforts have however been noted to reflect the desire of AMS “to be seen to be doing something in the face of international pressure” and

¹⁹⁶ For more details see Robert Beckman and J Ashley Roach, “Ratification and Implementation of Global Conventions on Piracy and Maritime Crimes”, in Beckman, *supra* n.181.

¹⁹⁷ For a discussion on the limits of UNCLOS and the Rome Convention in the region, see Barrios, *supra* n.186, at 155-158.

¹⁹⁸ Most piracy incidents in the region occur within AMS territorial waters and thus do not qualify as piracy under UNCLOS. See Robert Beckman, “The Piracy Regime under UNCLOS: Problems and Prospects for Cooperation”, in Beckman, *supra* n.181.

¹⁹⁹ For a discussion on ASEAN's tangible efforts to tackle maritime piracy through regional conventions, see Termsak Chalermphanpap and Mayla Inbanez, “ASEAN Measures in Combating Piracy and other Maritime Crimes”, in Beckman, *supra* n.181, at 158-162.

²⁰⁰ Robert Beckman, “Combating Piracy and Armed Robbery Against Ships in Southeast Asia: The Way Forward”, *Ocean Development & International Law*, 33 (2002):317-341, at 333-334.

²⁰¹ A regional approach remains consistent with the purposes of UNCLOS, as long as the modifications are compatible with UNCLOS' purpose and goal, and would make it easier for States to enforce their treaty obligations. See Timothy Goodman, ““Leaving the Corsair's Name to Other Times:” How to Enforce the Law of Sea Piracy in the 21st Century Through Regional International Agreements”, *Case Western Reserve Journal of International Law* 31 (1999): 139-168, at 156-58.

²⁰² In June 2004, Indonesia proposed trilateral patrols, and both Malaysia and Singapore quickly agreed to the proposal. The first coordinated patrols by the three littoral states in their respective territorial waters were launched on 20 July 2004. See Catherine Raymond, “Piracy in the Waters of Southeast Asia”, in Chong Guan Kwa and John Skogan, eds., *Maritime Security in Southeast Asia* (London: Routledge, 2007), at 73.

²⁰³ The three littoral States were willing to put aside sovereignty concerns and allowed foreign forces across their borders for the EiS initiative, based on the understanding that each patrol aircraft will have a representative from each country on board. Catherine Raymond, “Piracy and Armed Robbery in the Malacca Straits: A Problem Solved?”, *Naval War College Review* 62 (2009): 31-42, at 38.

²⁰⁴ For details, see Storey, *supra* n.181, at 115-116.

avoid external interference, rather than to tackle maritime piracy within Southeast Asia.²⁰⁵ For example, the perceived threat of US intervention in Southeast Asian waters played a vital role in establishing cooperation among regional countries.²⁰⁶ Malaysia and Indonesia protested after the Commander of US Pacific Command, Admiral Thomas Fargo, identified the Regional Maritime Security Initiative (RMSI) as a way to tackle maritime security threats.²⁰⁷ Both countries not only viewed RMSI as an erosion of sovereignty, but also as belittling their ability to secure their territorial waters.²⁰⁸ Besides concerns that US military presence might fuel Islamic radicalism in the region, then-Malaysian Foreign Minister Syed Hamid Albar also stressed that foreign economic interest in the Malacca Straits “does not convert the sovereignty and territorial integrity of the area”.²⁰⁹ Ultimately, the RMSI controversy spurred greater cooperation among the littoral states to defend against the risk of foreign intervention and led to the MSP. This is akin to the present contention that the resistance of AMS towards the ICC can be beneficially re-focused into a regional ICrimJ initiative.

In line with the efforts to create an ASEAN Political, Economic and Security Community, there have also been various regional initiatives to strengthen cooperation to prevent and combat transnational crimes, including piracy.²¹⁰ In this vein, the issue of maritime crimes has been addressed at the ASEAN Regional Forum (ARF) for over a decade.²¹¹ During the last ARF Inter-Sessional Meeting on Counter-Terrorism and Transnational Crime in 2013, the AMS noted “the successful efforts in addressing maritime security, particularly piracy at sea in South-East Asia, through strengthened cooperation and information exchange to address its root causes”.²¹²

²⁰⁵ Raymond, *supra* n.203, at 38.

²⁰⁶ Storey, *supra* n.181, at 96

²⁰⁷ The goal of RMSI was to improve international cooperation against transnational security threats, *inter alia*, piracy in the “ungoverned littoral regions of Southeast Asia”. See Thomas Fargo, “Regarding US Pacific Command Posture”, testimony before the House Armed Services Committee, US House of Representatives, 31 March 2004, at www.pacom.mil/speeches/sst2004/040331housearmedsvcscomm.shtml.

²⁰⁸ See Storey, *supra* n.181, at 113-114.

²⁰⁹ “S’pore Can’t Invite US to Patrol Straits: KL”, *Straits Times*, 12 May 2004.

²¹⁰ See ASEAN Regional Forum, “ASEAN Cooperation in Combating Transnational Crime Moving Towards 2015 and Beyond”, 13 October 2011, at <http://aseanregionalforum.asean.org/index/585-asean-cooperation-in-combating-transnational-crime-moving-towards-2015-and-beyond.html>.

²¹¹ See ASEAN Regional Forum, “ARF Statement on Cooperation Against Piracy and Other Threats to Maritime Security”, 17 June 2003, at <http://aseanregionalforum.asean.org/component/content/article/172.html>.

²¹² See ASEAN Regional Forum, “Co-Chairs’ Summary Report of the Eleventh ASEAN Regional Forum Inter-Sessional Meeting on Counter-Terrorism and Transnational Crime”, 4-5 March 2013, at para. 13, at <http://aseanregionalforum.asean.org/files/library/ARF%20Chairman's%20Statements%20and%20Reports/The%20Twentieth%20ASEAN%20Regional%20Forum.%202012-2013/14%20-%20>

While police and enforcement measures are important, regional countries understand that they must also deal with the political and socio-economic conditions promoting maritime crime in order to make real improvements to regional maritime security.²¹³ Hence, it is likely that an ASEAN ICrimJ initiative will similarly not only focus on formal legal mechanisms, but also consider informal alternative approaches to address regional crimes.

That said, sensitivity over national sovereignty and competing views on the piracy threat continue to impact cooperation in Southeast Asia.²¹⁴ The unwillingness of some of AMS to collaborate fully and commit resources then constrains the scope and effectiveness of cooperative endeavours. For example, the 2004 Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) has been greatly hampered by the continued reluctance of both Malaysia and Indonesia to sign the agreement.²¹⁵ ReCAAP is the first anti-piracy measure implemented at the government-to-government level, and establishes a framework for cooperation in three areas: (1) information exchange; (2) capacity building; and (3) operational cooperation.²¹⁶ An Information Sharing Center (ISC) has since also been set up in Singapore to facilitate communication and information sharing.²¹⁷ Apart from sovereignty concerns, Indonesia and Malaysia however also refused to ratify ReCAAP in protest against the decision to establish the ISC in Singapore.²¹⁸

Nevertheless, as the creation of the ASEAN Intergovernmental Commission on Human Rights (AICHR) has shown, it is not impossible that AMS may at some point agree to greater cooperation in the form of a regional ICrimJ mechanism to tackle international crimes, and defend against the risk of intervention by the ICC. Based on their efforts and emphasis to tackle selected illegal acts, AMS may also take

[Co-Chairs%20Summary%20Report%20-%2011th%20ARF%20ISM%20on%20CTTC,%20Ha%20Noi.pdf](#).

²¹³ Storey, *supra* n.181, at 98.

²¹⁴ Besides a lack of political will, there are also differing threat perceptions towards piracy amongst the AMS. For example, while Singapore views disruption to the free flow of shipping as an existential threat, Malaysia identifies illegal trafficking in people, small arms and narcotics as the central problem, and Indonesia views illegal fishing and smuggling as the main challenges. See *Ibid*, at 109-111.

²¹⁵ ReCAAP was formed in 2004 and entered into force in 2006 after the signature and ratification of ten out of the 16 participating States (all ten AMS, Japan, China, Korea, India, Bangladesh, and Sri Lanka). As at time of writing, Indonesia and Malaysia have yet to ratify ReCAAP.

²¹⁶ See ReCAAP website, at www.recaap.org

²¹⁷ The ISC was inaugurated on 29 November 2006 and was declared as the International organisation on 30 January 2007. It produces quarterly, half-yearly, and annual reports on maritime piracy in the region, which are available at the ReCAAP website.

²¹⁸ For details, see Storey, *supra* n.181, at 114-115.

the opportunity to create a list of regional crimes that will likely include maritime piracy.

5.4 Conclusion

A regional crime is envisaged to be a subset of transnational ‘treaty crimes’ subscribed to within a specific region, as well as any international crime that is part of customary international law and of particular importance to the regional community of States. They can be set apart from other transnational acts criminalised by an international/regional treaty by two criteria: (1) regional community recognition; and (2) ‘extreme seriousness’ within a regional context. Given the importance of maintaining peace and security as a fundamental interest of the international community and to the notion of international crimes, it will also be reflective of collective regional interests and its breach an indicium of seriousness for regional crimes. The humanitarian consideration of protecting people against atrocity is similarly not just an expanding marker of seriousness for international crimes, but also a useful indicator for regional crimes. A politically amenable and practical conceptualisation of regional *jus cogens*, which specifies norms of fundamental interest to a regional community and highlights the underlying State objectives in proscribing certain acts, may be another term of reference for regional crimes. Obligations *erga omnes partes* that detail the obligations and procedural consequences of a breach of a treaty promoting and protecting the collective interest of a regional grouping of States may be a further indicium of seriousness for regional crimes.

The 1997 *ASEAN Declaration on Transnational Crime* identified six transnational crimes that affected regional peace and stability, as well as “the welfare of the region's peoples”. If viewed together with subsequent regional initiatives, a basis for regional crimes in Southeast Asia may exist. Indeed, it is theoretically possible that some of the eight crimes currently identified by AMS as areas of focus can constitute regional crimes. Terrorism, human trafficking, drug trafficking, arms smuggling, sea piracy, money laundering, international economic crime, and cybercrime are already considered to be extremely serious regional problems and addressed in various regional conventions. Such *erga omnes partes* obligations may possibly indicate regional customary law or eventually evolve into regional *jus cogens norms*.

While regional sensitivities on the issues of territorial integrity and State sovereignty cannot be ignored, maritime piracy is then most likely to be elevated as a regional crime in Southeast Asia because it has long been recognised as an international crime and may be an example of regional *jus cogens* amongst AMS. It is also of concern to other geographical regions and stands a high chance of acceptance in these parts of the world. This raises the possibility of initiatives in one region spurring development or serving as a template for other regions.²¹⁹ By expanding the list of crimes to address specific regional priorities, regionalising ICrimJ thus opens opportunities for additional crimes to later be selectively adopted in other regions or perhaps even accepted at the international level.²²⁰

²¹⁹ Indeed, parallel developments in Africa to establish a criminal chamber in the AfCHPR to prosecute international crimes will help address questions about the potential relationship between the ICC and a regional court, and whether: (1) a regional ICrimJ mechanism is more cost effective, while addressing concerns about selective justice and ‘foreign’ interference; (2) proximity to the victims increases its legitimacy and acceptance; and (3) the incorporation of alternative/informal justice mechanisms, as well as infusion of local values and customs, makes a regional initiative more responsive and credible to locals than the ICC. For a discussion, see Max du Plessis, Tiyanjana Maluwa, and Annie O’Reilly, “Africa and the International Criminal Court”, *Chatham House Programme Paper International Law 2013/01*, July 2013, at www.chathamhouse.org/sites/default/files/public/Research/International%20Law/0713pp_iccafrica.pdf.

²²⁰ It is noteworthy that the AU is required to formulate a crime of “unconstitutional change of government” to give effect to Article 25(5) of the *African Charter on Democracy, Elections and Governance*. In this regard, it has been suggested as a crime that should be added to the jurisdiction of an African criminal court, together several other pan-African problems like drug trafficking, piracy and corruption. See *ibid*, at 9-10; and IRIN, “Analysis: How Close is an African Criminal Court?”, *IRIN*, 13 June 2012, at <http://www.irinnews.org/report/95633/analysis-how-close-is-an-african-criminal-court>.

CONCLUSION

The research has argued that furthering ICrimJ through regional initiatives not only helps in the effective enforcement of ICL, but can also serve the interests of sovereign States. It showed that regional ICrimJ mechanisms can be an alternative aligned with the political calculations of States, including those not convinced by arguments of morality and preventing impunity, as well as able to promote the goals of ICrimJ according to the needs of their unique regional situation. In this regard, the research has explained the theoretical appeal and utility of regionalism to self-interested States through the lens of both neo-liberalism and neo-realism. As regional initiatives can achieve greater legitimacy, support and compliance from both the concerned State(s) and regional neighbours, the regionalisation of ICrimJ is posited as a theoretically possible, practically viable and politically acceptable approach to promote and advance ICL. Regionalism therefore clearly provides both normative and practical contributions to the study and advancement of ICrimJ.

Support and cooperation on enforcement activities can be further expected when regional initiatives additionally function as an effective monitor of agreed standards or measures. As a corollary, regardless of whether it is accepted that ICL is culturally specific and not inherently universal or value-neutral, it is important to recognise the different norms, values, and legal precepts that exist in various parts of the world. By excluding them, there is a greater possibility that ICrimJ may not be well-received. Even worse, claims that ICL is a new form of Western political and legal imperialism could strengthen resistance and unleash a regional backlash against the pursuit of ICrimJ, especially if indigenous justice mechanisms and goals are irreverently swept aside. This could also manifest if the normalisation of ICL leads to a stringent and uncompromising focus on specific core international crimes, at the expense of other crimes that may be of particular relevance and concern to some regions of the world.

Regional initiatives thus have political allure as they not only allow for and reflect local legal norms and political considerations, but also crucially place enforcement of ICL in each geographic area primarily in the hands of the regional countries. This has become important with the establishment of the ICC, which has challenged the absolute sovereignty of States over the prosecution of international

crimes that previously existed. Notably, some countries have closed ranks to circumvent action by the Court or simply refuse to accept its indictments.

While occupying the same space and proffering some of the same benefits discussed, internationalised domestic tribunals are recognised as being *ad hoc* and importantly also *post hoc*. Hence, they will not be institutions with long-term objectives and plans. Compared to a permanent regional mechanism, hybrid courts are less likely to stop international crimes from being perpetrated, let alone leave a legacy beyond a narrow prosecutorial function. Their shortcomings are clear from the experiences of the both SPSC in East Timor that was unable to prosecute the ‘big fish’ and engage the locals, as well as the ECCC in Cambodia that has been criticised for political interference, corruption, bias, and not meeting international fair trial standards. As such, it is questionable whether hybrid tribunals have improved the situation or attitudes towards ICrimJ in Southeast Asia.

The research has also highlighted that ASEAN countries remain highly reluctant to relinquish sovereignty, redistribute their power, and interfere in the domestic affairs of neighbouring States. Given that intra-regional development of ICL is controlled by AMS, it is important to provide real political and strategic incentives for collective action by this regional grouping to advance ICrimJ. By being politically sensitive to inter-State relations, internally promulgated regional initiatives can arguably serve the interests of individual AMS and provide an alternative route for the consistent enforcement of ICL. The likelihood of an ASEAN response to a violation of ICL by a member State is increased if the results of its collective action are more tangible and easily achieved, and the costs can be shared amongst the AMS.

Fears about the circumscription of State sovereignty and immunity can then be addressed by drawing reference to the twin ICrimJ goals of preserving peace and security, as well as protecting people against atrocities. Viewed with a state-centric lens, the principles behind ICrimJ and its enforcement may be linked to the conflict management and resolution that herald plurilateral security cooperation in Southeast Asia. In this regard, AMS will be incentivised to uphold ICrimJ if a destabilising situation significantly affects their collective and national interests. Motivations include maintaining a safe and stable regional environment, preventing the spread of conflict and atrocities, and addressing the flow of refugees across borders. A further impetus for response by third-party AMS will be the humanitarian consideration of protecting people against atrocities, which may arise from internal domestic pressures.

It is clear that AMS are not unaffected by the international normative environment. For example, Katsumata points out that they have ‘mimetically’ been adopting human rights norms advanced by the Western industrialised democracies.¹ Recognising that upholding human rights are increasingly deemed to be an element of international legitimacy, the underlying intent of a regional human rights body has been to secure ASEAN’s identity as a legitimate institution in the international community.² Besides building up an image more aligned with international norms, ASEAN countries have also stopped saying that such norms can be curtailed for economic development to shore up domestic political credibility,³ as well as to address increasingly assertive public demands for accountability.⁴

However, it is unclear if AMS can be similarly compelled to enforce ICL, let alone genuinely embrace the norms that underpin the ICrimJ system. ASEAN countries are in particular critical of the infringement of their sovereign rights by the prerogative of the ICC to try a case as long as it falls within the court’s jurisdiction. During the 1998 UN Diplomatic Conference of Plenipotentiaries, for example, Malaysia stated that while perpetrators of very serious crimes abhorred by the international community must be dealt with, the national sovereignty of all nations must always be upheld.⁵ Vietnam similarly declared that any activity of the Court without prior consent of the states concerned constitutes an encroachment of state sovereignty.⁶ Fifteen years later, the attitudes of the Southeast Asian countries towards the ICC have not changed. Indonesia thus maintains that it will not accede to the Rome Statute as the ICC may be a potential tool to interfere in domestic politics.⁷

¹ Conversely, the Western strategy of applying material leverage to pressure AMS to change their policies and undertake liberal reform increasingly suffers from diminishing utility. Hiro Katsumata, “ASEAN and human rights: resisting Western pressure or emulating the West?”, *The Pacific Review* 22 (2009): 619–637, at 630.

² *Ibid*, at 619.

³ For example, ASEAN participation in human rights treaties has been a signal to the citizenry that the governments are “not out of step with international mores” and are “in fact ‘liberalizing’ and answering the call to accountability”. Thio Li-ann, “Implementing Human Rights in ASEAN Countries: Promises to Keep and Miles to Go Before I Sleep”, *Yale Human Rights & Development Journal* 2 (1999):1-86, at 28.

⁴ Maznah Mohamad, “Towards a Human Rights Regime in Southeast Asia: Charting the Course of State Commitment”, *Contemporary Southeast Asia* 24 (2002): 230-251, at 230-231.

⁵ Statement by Ramanathan Vengadesan, Ambassador of Malaysia to Italy, at the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 18 June 1998. See UN doc. A/CONF.183/13 (Vol.II), at 109.

⁶ See Statement by Nguyen Ba Son, delegation of Vietnam, at the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 18 June 1998. See UN doc. A/CONF.183/13 (Vol.II), at 111.

⁷ While Article 11 of the Rome Statute clearly states that jurisdiction only applies to crimes committed after a country becomes a State Party, Indonesian politicians now argue that ratification could affect or even be used to block the bids of candidates in the 2014 Indonesian Presidential elections, in

Any attempt to advance and promote ICrimJ in Southeast Asia through regional initiatives must then recognise that it is counterproductive to use any form of pressure to alter quickly the stance taken by AMS on the enforcement of ICL. Indeed, changes to the form and substance of the ASEAN position must be evolutionary and self-driven, rather than revolutionary and the result of external forces. While the inclusive and consensual approach adopted by ASEAN can be problematic if core international crimes are committed in an AMS, the presence of a regional ICrimJ initiative within Southeast Asia is more likely to help deter and prevent mass atrocities from occurring than the absence of one.⁸ This is not a trivial point since political and military leaders will be under scrutiny and pressure to avoid deeds that would not be legally justifiable or morally condoned by their immediate neighbours. Hathaway points out that the regional context can be very influential in making States commit to normative values because “regional political and economic interdependence generates greater external pressure”.⁹

Within Southeast Asia, the goal and practical effects of ICrimJ may ultimately be more about deterrence and reconciliation, rather than punishment. This is consistent with the understanding that the informal and consultative approach adopted by AMS will favour non-penal forms of regional accountability and a restorative justice approach. Compared to retributive justice, they are more responsive to the spill-over effects and contextual complexities of egregious international crimes, as well as better tools for societal reconciliation. Indeed, it is recalled that the prosecutorial process does not translate into reconciliation in a divided society, let alone bring about national reconstruction and societal reintegration. Truth commissions and conditional amnesties could therefore be more appropriate amongst AMS and face less opposition when the conflict has cross-border elements or effects. Nevertheless, criminal trials are still recognised as a necessary component of the regional ICrimJ process if ASEAN countries envision a credible regional alternative to the ICC, especially one that can justifiably claim jurisdiction over an international crime.

particular Gen (retired) Wiranto and Lt. Gen (retired) Prabowo who have been deemed by the National Commission on Human Rights to be responsible for serious human rights violations during the 1998 May riots.

⁸ It is noteworthy that a key goal of the ICC at its establishment was to deter future crimes rather than to punish perpetrators of crimes that occurred before the Rome Statute entered into force.

⁹ Oona Hathaway, “Do Human Rights Treaties Make a Difference?”, *Yale Law Journal* 111 (2001): 1935-2042, at 2020.

It is likely that an institution capable of issuing authoritative and binding judgments against AMS or their nationals who commit serious regional crimes will develop in tandem or be aligned with the ASEAN Intergovernmental Commission on Human Rights (AICHR). Obligations *erga omnes partes* can then be derived from an ASEAN treaty, which will provide AMS with a strong entitlement to claim responsibility of another AMS following a breach of obligations to ensure that ICrimJ is served.¹⁰ In this regard, an ASEAN ICrimJ mechanism will probably be composed of nominated representatives from each AMS, and have its jurisdiction limited to the confines of Southeast Asia.¹¹ Given that criminal accountability and punishment would be the better approach to deal with higher-level offenders, they should be the focus of such a regional body. Restorative justice and non-penal sanctions could accordingly be used as the viable alternatives to formal prosecution for the masses of lower-level offenders. The creation of a formal regional judicial organ will then also be an opportunity for the ICC to engage ASEAN and influence the development of regional ICrimJ norms and procedures. As previously highlighted, Kenya already suggested, *inter alia*, an amendment to the Preamble of the ICC Statute with regards to its complementarity.¹² This will set the stage for the relationship between the Court and other regional mechanisms, such as in Southeast Asia. It is noteworthy that the AU will still continue work on expanding the African Court of Human and Peoples' Rights (AfCHPR) mandate to prosecute international crimes committed on the continent, potentially disregarding the ICC and ignoring possible overlaps between the two judicial bodies.¹³ It is therefore vital for the ICC to accommodate and engage such initiatives to avoid being shut out from the regional process. On the other hand, in line with its strategy to limit the impunity gap by using all appropriate means to bring perpetrators of international crimes to justice, the Court can benefit from engaging with regional initiatives that may develop. This will be crucial in assuaging State Parties to the Rome Statute not to eschew compliance or completely withdraw their

¹⁰ Regional ICrimJ mechanisms established under regional treaties will therefore have greater chances of having their decisions enforced than a demand between States based purely on customary international law.

¹¹ The creation of a proposed Humanitarian Assistance and Disaster Relief (HADR) coordination centre amongst AMS may also have some bearing on the composition and jurisdiction of a regional ICrimJ court, especially if humanitarian considerations and the prevention of atrocities gain importance within ASEAN.

¹² As Chapter 3 notes, there are no arguments or indications within the ICC Statute that regional courts need be carved out from the complementarity regime.

¹³ Max du Plessis, "Implications of the AU decision to give the African Court jurisdiction over international crimes", *Institute for Security Studies Paper 235*, June 2012, at 3.

support for the ICC, especially if States face conflicting obligations to the Court and regional organisations. It will also help address concerns about the reach of foreign powers and the fear of neo-colonialist threats by existing non-State Parties.

The realisation of a regional criminal court in Southeast Asia will however ultimately rely on a high level of political acquiescence, as well as the availability of resources and institutional infrastructure. As such, it is currently premature to press for the creation of a permanent regional court with a strong enforcement regime capable of issuing authoritative and binding judgments against member States or their nationals. To maintain regional peace and security, the reality is that some trade-offs are required when attempting to prevent impunity for core international/regional crimes. Maintaining a permanent legal institution will also be extremely onerous for the developing countries in the region, and difficult in terms of applying consistent procedures and standards for arrests, detentions and investigations across all ten AMS. Hence, ASEAN is unlikely to undertake any immediate or great degree of institutional change and development for both political and practical reasons. The more likely collective response involving a formal judicial institution in the short to medium term will probably be on an *ad hoc* basis, with jurisdictional preference granted to the State(s) in which the crimes occurred. Thus, it would more likely resemble the Indonesian domestic trials for crimes against humanity committed in 1999 under its Ad Hoc Human Rights Tribunal for East Timor, than the ECCC in Cambodia. However, if such *ad hoc* tribunals are established under an ASEAN treaty framework, there will be added regional pressure on the concerned AMS to prevent the disregard of concrete evidence of violations due to obligations *erga omnes partes* that arise. Regional oversight may be further bolstered if they are created along with ASEAN appointed commissions of inquiry to provide independent reports. To complement the criminal prosecutions performed by the affected AMS, these regional commission may potentially help manage any truth and reconciliation functions,¹⁴ which can include fact-finding and recording history, as well as strengthening the rule of law by providing education about the wrongfulness of the acts and deterring future misconduct. In this vein, the regional commissions could also assist in overseeing any

¹⁴ TRCs can effectively complement criminal trials by compelling individuals to incriminate themselves, morally condemn and discredit the perpetrators of abuses, and prepare the ground for future prosecutions or other sanctions. Indeed, while most TRCs do not interfere with or duplicate any tasks of a functioning judiciary, they “have had every intention of strengthening prosecutions”. Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions 2nd ed.* (New York: Routledge, 2011), at 13.

accompanying conditional and individualised amnesties that are offered to lower-level offenders.¹⁵

Given the 'ASEAN way' of making decisions through consultation and consensus, a practical first step towards regionalising ICrimJ would be the internally initiated promotion of ICL-related conventions and instruments, as well as the incorporation of regional norms and practices. This could be followed by the creation of a consultative mechanism to discuss ICL within the context of Southeast Asia, and subsequently regional monitoring procedures that lead to or support the abovementioned commissions of inquiry. Such a regional initiative would minimally reaffirm the ICL treaty commitments of AMS and encourage compatibility with international standards. Regional monitoring of such commitments could then increase awareness, entail greater respect, and facilitate public education of ICrimJ issues within individual ASEAN countries. As a result, it may potentially act as a catalyst for increased domestic scrutiny and an avenue for change, as well as encourage acceptance and promote implementation at the domestic level.

If required, situations could be referred to the regional monitoring group or commissions of inquiry created within an ASEAN treaty framework to investigate crimes that occurred within member States. Such mechanisms could be established in relation to the maintenance of regional peace and security, but their structures allowed to vary according to the situational needs.¹⁶ As mentioned earlier, regional commissions could help oversee conditional amnesty processes, as well as truth and reconciliation activities that may precede criminal trials. Their mandates should thus also be allowed to differ, based on requirements – from investigation, mediation, or administering compensation. With regards to any investigative and fact-finding powers, it would be prudent to ensure that they also accommodate instances where an AMS has demanded or suggested that a fact-finding mission be dispatched or an

¹⁵ It is recognised that amnesties do not however deprive other States of universal jurisdiction to prosecute persons accused of core international crimes, and that cases can still be brought before the ICC (or State Parties) if other jurisdictional requirements are met.

¹⁶ This could be and function like the Commissions and Investigative Bodies created by the UN Security Council to handle the range of tasks related to maintaining international peace and security. Examples include the International Commission of Inquiry for Darfur, which investigated violations of international humanitarian and human rights law, to determine whether acts of genocide occurred and to identify and hold the perpetrators accountable; and the Commission of Experts established pursuant to resolution 935 (1994) concerning Rwanda, which was tasked to examine and analyse information derived from investigations, and report on violations of international humanitarian law, including genocide. See UN, “Commissions and Investigative Bodies”, at www.un.org/en/sc/repertoire/subsidiary_organ/commissions_and_investigations.shtml.

investigation be carried out. The AU Commission of Inquiry on South Sudan provides a reference on the possible mandates, terms of reference, and expected recommendations.¹⁷

One way to mitigate and avoid the consensual approach adopted by ASEAN from becoming an obstacle to ICrimJ is to ensure that the intergovernmental commission on regional crimes makes its annual reports and minutes of meetings publicly available. Once ASEAN stakeholders become convinced of the political prudence of upholding ICrimJ, the regional monitoring and non-judicial mechanisms may eventually lead to the acceptance for and establishment of a regional criminal court, which could potentially also consider situations put forward by the AICHR. Amongst the list of crimes that are considered by AMS to be serious threats to regional peace and security, a plausible 'regional crime' that can also be considered by an ASEAN ICrimJ initiative is sea piracy. As it is also a serious crime of concern in other parts of the world, it can lead to the expansion of the list of crimes recognised in other regions. The regionalisation of ICrimJ can then have a further value-added effect by organically adding to the basket of international crimes recognised at the global level.

In this connection, besides the focus on advancing ICrimJ in Southeast Asia, a further objective of this research has also been to develop some general conclusions about the theoretical viability and practical appeal of a regional approach. While it is tempting to paint the possibility of regionalising ICrimJ with a broad brush, it is recognised that there is immense diversity both in terms of what justice means in different geographic areas, as well as the nature of the threats and types of crimes that plague various parts of the world. For example, the political and strategic incentives for collective action by regional groupings of States to advance ICrimJ and enforce ICL may differ greatly, while problems like the illicit drug trade and piracy may be particularly serious in one region but possibly even non-existent in another. Nevertheless, identifying generalisations about the regionalisation of ICrimJ are valuable for two reasons: (1) it uncovers various incentives and favourable conditions for shifting some burden of upholding ICL to the regional level; and (2) it provides a

¹⁷ These include the investigation of human rights violations and other abuses committed, as well as the causes underlying the violations; and to make recommendations on the best ways and means to ensure accountability and reconciliation with a view to deterring and preventing a recurrence of the conflict and future violations. See AU Media Advisory, "Second Field Mission of the African Union Commission of Inquiry on South Sudan to Juba, South Sudan", 22 April 2014. Available at <http://au.int/en/node/4465>.

starting platform for States to determine the relative costs and benefits of various (domestic, regional, or international) options to address each set of unique situation and circumstances.

Firstly, the regionalisation of ICrimJ has political appeal as it puts States firmly back in the driver's seat, particularly on situations in their own backyard. Regional initiatives on ICrimJ proffer a way for States to avoid appearing supportive of impunity for international crimes, while retaining control over the development and enforcement of ICL in their immediate region. In this regard, they provide States with both a credible alternative and extra layer between the ICC and themselves. Secondly, they provide an opportunity to target crimes that may be unique but pertinent to their region, and more importantly reflect local value systems and notions of justice. Thirdly, a regional approach may then be better able to understand and prioritise the needs of the situation because it will be more politically attuned and culturally sensitive to the needs both sets of victims. By providing a geographic nexus to the crimes being investigated, regionalising ICrimJ not only deals with the problem of disconnect from the situation and the victims, but also addresses some concerns regarding selectivity and bias that allegedly exists at the international level.

Fourthly, in terms of enforcement, a neutral regional initiative may be better able to secure the cooperation of the affected State as well as ensure that neighbouring States apprehend and prosecute or extradite suspects that have fled across the border into their territory. Not only does it reduce concerns of exposure to external (particularly Western liberal) political influences and lessen the sovereignty costs for the concerned State, regional pressures from neighbouring countries to comply are less likely to be ignored. Indeed, a regional approach may be more successful than international initiatives at upholding ICrimJ because neighbouring regional States will clearly be more (directly and indirectly) affected and more incentivised to act, not least to prevent the harmful effects from recurring and spilling over their borders. Fifthly, joint collective action by all the regional countries then curtails criticisms by acting as a check-and-balance against self-interested political motivations, and increases the legitimacy and credibility of the solution and its outcomes. Sixthly, the onerous and costly exercise can be shared amongst the various regional neighbours, and would be amply justified by the maintenance of regional peace and economic stability. Burden-sharing will definitely help consolidate and strengthen cooperation on ICrimJ between international, regional and State actors.

Last but not least, a regional approach would also prove more effective and efficient at punishing perpetrators of international crimes than national solutions, particularly when the atrocities have been perpetrated by the State or when local accountability mechanisms may be abused for intimidation and revenge. Indeed, the likelihood of impartial and proper proceedings within States afflicted by international crimes are low as their domestic legal systems will have inherent biases regarding the guilt or innocence of an individual. Alternatively, piercing the veil of impunity may be less important than securing peace and reconciliation. In post-conflict societies, problems may be further compounded by the lack of necessary infrastructure, resources and properly trained personnel to pursue accountability under ICL. In this connection, regional ICrimJ initiatives should take into account transitional justice issues, such as national reconstruction and societal reintegration. Depending on the context and nature of the crime(s), restorative justice and non-penal forms of accountability may be more appropriate than retributive justice and criminal trials. While criminal prosecution of high-level offenders should be a facet of regional ICrimJ initiatives, truth commissions and limited amnesties may then also be considered as valid tools for dealing with the masses of low-level offenders.

It is however also acknowledged that regional initiatives are not perfect or without shortcomings, and certainly no panacea for the political and practical difficulties of pursuing ICrimJ. There will be disadvantages and disincentives to regional efforts, particularly when: (1) a regional hegemon is involved; (2) there are few commitments to regional norms; (3) the political risks and financial costs are high; and (4) the burden of action is only shared by a few States. Indeed, roadblocks can develop due to the presence of a regional hegemon and the absence of a country willing to take the lead. Inter-States rivalries and political cleavages can further obviate that advantage of regional collective action. In this regard, regional organisations may be prevented from taking action that may compromise member State sovereignty, or be caught in between two or more conflicting members. Some regional bodies may also not have the mandate to tackle ICrimJ issues and enforce ICL, let alone have the necessary infrastructure, resources and processes in place. Specific conclusions about the prospect of regionalising ICrimJ in different geographic regions can therefore be attained only from individualised examination. This will include what may be deemed as ‘regional crimes’, based on: (1) regional community recognition; and (2) ‘extreme seriousness’ within a regional context.

Indicators of seriousness include threats to regional peace and security, atrocities that raises ‘social alarm’ within the regional community, as well as breaches of regional *jus cogens* norms and obligations *erga omnes partes*.

The efficacy of a regional solution will depend on the region in question, the capabilities of the States (or regional associations) undertaking such efforts, as well as the nature of the crime(s) committed. A natural and suggested follow-up to this research is an analysis of the viability of a regional ICrimJ mechanism in other parts of Asia, including the possibility of opening the proposed ASEAN ICrimJ to non-AMS. This may be developed as an expansion of the ASEAN Plus Three (APT) cooperation, consisting of the 10 AMS, China, Japan and South Korea.¹⁸ Developments in Africa will however remain important for the notion of regionalising ICrimJ, not least because of the failure by AU Member States to cooperate with the ICC. Allegations by African countries that the Court unfairly targets them, compounded by the AU requests for the ICC trials against current Kenyan President Kenyatta and Vice President Ruto to be suspended until they complete their terms of office,¹⁹ have already led the process of expanding the AfCHPR mandate to be fast-tracked.²⁰ It is noteworthy that an amendment to the Preamble of the ICC Statute, regarding the Court’s complementarity regime, to recognise regional courts has then been suggested by Kenya.²¹ Undoubtedly, the ability of the Extraordinary African Chambers to conduct a fair trial of former Chadian President Hissène Habré will then strengthen the argument and resolve of the AU for international crimes committed in Africa to be tried within the region.²²

¹⁸ For more on APT, see www.asean.org/asean/external-relations/asean-3/item/asean-plus-three-cooperation.

¹⁹ The Kenyatta trial at the ICC has been postponed four times, with the start date now set for October 2014.

²⁰ At its 23rd Summit in June 2014, the AU adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. It thereby created an International Criminal Law Section with jurisdiction over: (1) genocide; (2) crimes against humanity; (3) war crimes; (4) the crime of unconstitutional change of government; (5) piracy; (6) terrorism; (7) mercenarism; (8) corruption; (9) money laundering; (10) trafficking in persons; (11) trafficking in drugs; (12) trafficking in hazardous wastes; (13) illicit exploitation of natural resources; and (14) the crime of aggression. Significantly, the African Court cannot commence or continue charges against serving AU Heads of State or Government, and other senior state officials based on their functions, during their tenure of office. See discussion in Chapter 2.

²¹ The amendment proposals by Kenya were received by the Secretary-General of the UN, acting in his capacity as depository, in March 2014.

²² The expanded African Court of Justice and Human and Peoples Rights (AfCJHPR) will however have jurisdiction only over crimes committed after the entry into force of the Protocol on Amendments and its Statute – 30 days after the ratification by 15 AU Member States.

In addition to an expanded study on the broader Asian region, an analysis of the regionalisation of ICrimJ in Africa will therefore also prove to be highly worthwhile. It can provide greater insights on the future relationship and interaction between the ICC, regional courts, as well as both States Parties to the Rome Statute and non-party States.²³ Together, both regional studies will help further elucidate how ICrimJ can be best promoted and protected by recognising theoretical variants in different regions, and through the regionalisation of ICL in terms of regional enforcement mechanisms or lists of crimes.²⁴

²³ It is significant that, in terms of complementary jurisdiction, the AfCJHPR Statute adopted by the AU in June 2014 does not mention the ICC, and only refers to National Courts and Courts of the Regional Economic Communities.

²⁴ The list of crimes under the AfCJHPR jurisdiction clearly signals the importance placed by the AU in combating the various illicit activities affecting the region – beyond the core international crimes.

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